

# **VOLVO OCEAN RACE 2008-9 INTERNATIONAL JURY**

## **Case VOR03**

**Application by Ericsson Racing Team (ERT) to re-open the  
Hearing relating to E3 racing without a Measurement  
Certificate.**

## **JURY NOTICE JN05**

**Jury Decision 14<sup>th</sup> October 2008 (typo amended para 20)  
(paragraphs 22-24 published 10<sup>th</sup> October)**

To: Ericsson Racing Team,  
Copy to: Volvo Event Management, Chief Measurer , Press Office.  
From: Volvo Ocean Race International Jury (Jury)

1. On 2<sup>nd</sup> October, the Jury published its decision in relation to an Application from Volvo Event Management UK Limited, the Organising Authority for the Volvo Ocean Race, applying for permission for the boat Ericsson 3 ("E3") to race notwithstanding the fact that the boat would not have a valid VO70 (Version 2) certificate at the start of the In Port Race scheduled to start in Alicante on 4th October 2008.

2. The decision was to permit E3 to race in all Races, in spite of not holding a Measurement Certificate. However, in recognition of the importance that the Jury placed on all boats in a race being fully rule compliant and in possession of a Certificate, the Jury imposed a condition: 'Whilst benefiting from this permission, ERT shall be penalized by the deduction of one point at the conclusion of any day in which there has been one or more In Port races; by one point at each Scoring Waypoint; and by two points at the conclusion of each Leg. However her score shall not be less than 'zero points' in each instance.'

3. On 3<sup>rd</sup> October 2008, the Jury received from ERT a Request to Re-open the hearing on the grounds that four of the clauses in the Decision were not true; namely

- It is not true that ERT did not present to the RMG a detailed proposed procedure.<sup>1</sup>
- It is not true that in Lanzarote "The Chief Measurer advised ERT representatives that the keel was still not solid and therefore in his opinion did not comply with the Rule".<sup>2</sup>
- It is not true that "In the latter part of August 2008, ERT accepted that it would not be possible to carry out a procedure which would completely fill the holes and satisfy the requirement of the rule"<sup>3</sup>.

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<sup>1</sup> VOR03 19. To fill the voids completely, which the RMG had consistently made clear was essential for compliance, was clearly a challenging objective. ERT sought expert advice as to how the problem could be resolved, but at no time presented to the RMG a detailed proposed procedure.

<sup>2</sup> VOR03 20. The Chief Measurer observed the modification process and advised ERT representatives that the keel was still not solid and therefore in his opinion did not comply with the Rule.

<sup>3</sup> VOR03 21. In the latter part of August 2008, ERT accepted that it would not be possible to carry out a procedure which would completely fill the holes and satisfy the requirement of the rule.

- It is not true that a new keel was not built.<sup>4</sup>

ERT submitted that ‘Since the facts above form part of the conclusions of the Jury and the justification of its decision ERT considers that the Jury may have made a significant error, in addition ERT would like to present significant new evidence.’

4. The Jury invited the OA and the RMG to respond if they so wished.

5. The Jury received a response from the RMG dated 4<sup>th</sup> October stating that

5.1 it ‘strongly disagrees with many of the allegations made in the Request to Reopen by Ericsson Racing Team’ and that ‘ERT never presented a detailed proposal on the proposed modification to the E3 keel despite being asked to do so on many occasions in emails between April and August 2008’

5.2 ‘The Chief Measurer advised Ben Wright of ERT when in Lanzarote that despite their endeavours, the voids still in the keel meant it did not comply with the rule requirement for the basic construction of the keel fin to be solid.’

5.3 ‘The Request to Reopen says that it is not true that a new keel was not built. It is our understanding that the only new keel built is now on E4, but if not, we invite ERT to present a new rule-compliant keel for measurement. In the RMG’s opinion components built and fitted to E4 have no relevance to this case.’

5.4 ‘It is difficult to be certain about what keels ERT has built due to their refusal to follow the process outlined by the RMG in Memorandum No 5 issued to the Teams on 11th February 2008. ERT are the only Team which has refused to follow the request in this Memo.’

5.5 The RMG Submission included details of communications with ERT supporting the assertion that the RMG never gave any indication that the keel would be compliant unless ERT could find a way of completely filling the holes, and that ERT never submitted an acceptable proposal describing how they intended to make the keel compliant.

5.6 The RMG report asserted ‘There is no substance whatsoever to the allegation that RMG have misled the ERT.’

5.7 The RMG summarised its position: ‘RMG has never accepted that filling the holes would result in the keel fin being compliant, it discussed as a possible solution but a report was requested so that the details could be discussed by RMG, First request was made at the meeting on 25th April, then on numerous subsequent occasions.’

5.8 ‘The Protocol submitted on 28th July was rejected on the basis of not being detailed enough, further questions were asked. The amended Protocol submitted on 8th August after the work had been done had been superseded by arrangements made in Lanzarote between JD [James Dadd] and BW [Ben Wright] to the effect that JD would be there as an observer only and to record what was done, no prior

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<sup>4</sup> VOR03 25. However, not having received approval from the RMG for any practical procedure, there became a time at which the idea of filling the holes should have been abandoned and a new keel built.

approval was given to the modification. By the time the second Protocol was sent JD had already observed the work and advised ERT team members while in Lanzarote that in his opinion the fin still did not comply with the rule requirement to be solid.'

5.9 'It is agreed that no further formal communication was sent about the non compliance until the Organisers application on 23rd September, during this time the RMG was considering what options were available to deal with the non compliance and were also fully involved with discussions and negotiations over the design of the proposed E4 keel, which the RMG also considered illegal and had been the subject of ongoing communications with RMG and the OA between the time the design was presented at the meeting on the 25th April and the time of the arrival of the boats in Alicante. - It is agreed that the last paragraph was added at the time the Report was prepared for the Organisers Application for Permission for E3 to race.'

6. The Jury received a response from the Organising Authority dated 6th October 2008, submitting that

6.1 'there has been no error by the Jury, their conclusions are entirely reasonable based on all the information presented in the Application for Permission to Race, the RMG Report, the Combined Submission of the Other Teams and the ERT submission.'

6.2 'The Request itself does not reveal any significant new evidence which was not previously available to ERT.'

6.3 'At no stage did the OA give assurances that the E3 keel was fine, the quotes are taken out of context. During the last few months the issue of non complying ERT keels has consumed a considerable amount of the OA's time and there have [been] numerous meetings, emails and phone conversations with ERT representatives. This time was spent with the aim of assisting ERT to reach the required level of rule compliance to enable their boats to race whilst also ensuring that RMG was acting within its powers.'

6.4 'The quotes are part of longer conversations, and in those conversations and all other communications there was never any guarantee given that E3 would be able to race, it was always made clear to ERT that the primary responsibility for rule compliance lies with the Team and that the decision on whether they have complied with the Volvo Open 70 Rule is the responsibility of the RMG. The OA advised ERT that they considered NOR 5.1(g) was a way of the boat being able to race but was always clear that the decision rested with the Jury...'

6.5.'The OA therefore refutes the assertion of ERT that the quotes of statements made are clear examples of how ERT was led to believe that the endeavours that ERT had effectuated were sufficient to become a valid entry and race around the world on equal terms with all other competitors without penalties.'

6.6 'The OA has been genuine and consistent with what it has told ERT but regretfully ERT has not reciprocated. Relevant facts have not been fully disclosed, and whether this has been deliberate or not, the lack of disclosure has resulted in the

OA being misled. The resulting confusion has continued in the papers filed by ERT in this application.'

6.7. 'For example for some time ERT said they had no available alternatives, could not build a new keel in time and unless a solution could be found they would have to withdraw from the Race. But in the Request they now say they did in fact plan a double solution for the E3 keel fin and both solutions were put in practice.'

6.8 'What the Request does not mention is that the replacement keel fin referred to in the first paragraph of Clause 6 of the Request is now actually on E4. On the 19th September at a meeting between Knut Frostad, Jack Lloyd and Richard Brisius, where the issue of ERT misleading the OA was discussed, Richard Brisius advised that the new keel on E4 had originally been built as a replacement for E3. This was also confirmed by Juan K, the designer, in a phone conversation that day. This particular keel fin had been formally presented for measurement as E4's keel the night before on 18th September at a meeting involving Luis Saenz, Juan K, and Richard Brisius on behalf of ERT; James Dadd, Shaun Ritson and Nick Nicholson on behalf of the RMG; Knut Frostad, Jack Lloyd and Russell Green on behalf of the OA.'

6.9 'The reason behind this change was that the original keel fin we were led to believe was designed for E4 was also considered illegal by RMG. First presented at a meeting on 28th April, this design was also ruled not to comply with the requirement that keel fins be solid. Despite many representations from ERT and Juan K Design from then until September RMG never gave its approval of the design. Interestingly enough up until the meeting on 18th September ERT had given the OA and RMG the impression that this design had been built and was on E4. For example on 21st August by email James Dadd, on behalf of the RMG had asked Luis Saenz " whether the keel presently fitted to E4 is the keel which you intend to use is the keel you intend to use in the Race and the design information supplied fairly represents that keel?" In his reply on 27th August Luis Saenz said " Yes I can confirm to you that what we call " E4 Keel Fin" as described in my papers with all the designs and calculations reproduced therein is the keel that Ericsson Racing team intends to use in the race". The Ericsson boats left Lanzarote soon after to sail to Alicante, but by the 18th September there was a different keel on E4 and the modified keel on E3.

6.10 'Today the OA and RMG have been advised by ERT of their plan to build a new keel fin as soon as possible and to try and have it ready for fitting at the Cape Town stopover. Arrangements for RMG to inspect the keel fin during the construction process to ensure rule compliance have been discussed along with the apparent misunderstanding of ERT management raised by Clause 6 of the Request.

6.11 'In that clause ERT correctly claims that the first time ERT had access to the Chief Measurers Report and in particular the conclusions contained therein was on 23rd September. This was because the Report had only just been finalized at that time and the conclusion added ready for it to be appended to the OA's application for permission for E3 to race. RMG has submitted to the Jury a full Timeline Summary from which it can be seen that a draft report on the modification work was sent to ERT for comment on the 10th August and they responded on 14th August with a few minor amendments. The Report then sat in draft form until after the Measurers assembled in Alicante, considered it and finalized it by including the concluding paragraphs then had it approved by all members of the RMG before submission to

the OA. The Report was not needed until after the NOR Amendment No 9 came in to effect on 12th September enabling the OA to consider making an Application for Permission for E3 to Race.'

6.12 'During this period the OA was involved in various communications with ERT and from the tenor of those communications it was taken as read that ERT understood the fact that despite modification the E3 keel remained non compliant with the rule. In today's discussions the OA learned that ERT management had a different understanding of the situation and in retrospect such a misunderstanding would not have been possible if a further formal communication had been sent to ERT by RMG prior to the finalization of the Report.'

6.13 'Although in our opinion this is not a pivotal issue in the case, if the Jury is satisfied that this misunderstanding has genuinely delayed their commencement of the building of a new keel fin and despite very best endeavours by ERT, compromised their ability to fit that keel before the restart in Cape Town, we would not oppose the Jury reopening the hearing to consider an adjustment of the penalty.'

## CONCLUSIONS

7. The Jury has fully considered the Request to Re-open and has also taken the opportunity to review the scoring points penalty imposed while E3 remains non-compliant.

8. The Jury has had consideration for the other teams who may have managed their development programmes in a more conservative way without risks of being non-compliant, especially considering the long lead time involved in constructing a keel.

9 It is unfortunate for the sailors of E3 that they may not have been involved in decisions regarding the development of the keels and which keel was to be used on which boat, but in a development class such as the Volvo 70, the designers along with many others have as much a significant contribution to make to a successful team as have the sailors.

10 It has become apparent that the failure for the original keel on E4 to be found to be compliant by the RMG, and the decision to use the compliant keel from E3 on E4 contributed to the problem of not leaving sufficient time to build a new keel when the keel currently fitted to E3 was not able to be made compliant.

11 In considering the appropriate points penalty arrangement, and re-considering the penalty in the light of these submissions, the Jury was mindful of the management of the keel programme which involved a strategy with some risk, and possibly an element of 'brinkmanship'.

12 The Jury applauds the considerable efforts being made by ERT to fabricate a new compliant keel and fit it in Cape Town, and notes the cooperation by the RMG and the OA in helping to facilitate this.

## ANSWERING ERT's 'REASONS IN SUPPORT OF THEIR REQUEST FOR RE-OPENING'

13 *'It is not true that ERT did not present to the RMG a detailed proposed procedure.'* The Jury is satisfied that no proposal was presented by ERT to the RMG that met the needs of the RMG (that is, sufficient information to enable the RMG to say to ERT 'if you successfully do what is proposed, the keel will become compliant'.

14 *'It is not true that in Lanzarote "The Chief Measurer advised ERT representatives that the keel was still not solid and therefore in his opinion did not comply with the Rule".'* The evidence on this matter from ERT and that from the RMG conflicts. There may have been a misunderstanding, but since it is agreed by both sides that at no time did the RMG indicate that the procedure employed (of filling the holes with rods of a lesser diameter) would make the keel compliant, this is not a pivotal issue.

15 *'It is not true that "In the latter part of August 2008, ERT accepted that it would not be possible to carry out a procedure which would completely fill the holes and satisfy the requirement of the rule"'* The Jury is satisfied that a procedure which might have completely filled the holes (by freezing rods of a diameter which when returned to an ambient temperature would completely fill the holes) was, understandably, abandoned, in favour of a (safer) procedure which would clearly not fill the holes. However, even if the Jury's finding were not true, this does not absolve ERT's responsibility to ensure they have a compliant keel.

16 *'It is not true that a new keel was not built'* The Jury accepts that there may have been a new keel built for E3 which was then used on E4 when E4's keel was found to be non-compliant.

## SUMMARY

17 Basically the case comes down to a claim by ERT that they were misled into believing that either the RMG would accept as compliant a non-compliant keel which had been 'repaired' or that E3 would be permitted to race without penalty with the 'repaired' non-compliant keel. ERT also claims that the penalty is excessive.

18 Had the keel intended for E4 been found to be compliant by the RMG, there would not have been a problem. When it was rejected by the RMG, a compliant keel was fitted to E4, and a decision was made to 'repair' the other non-compliant keel (with holes filled) so as to become compliant and fit it to E3.

19 Although there is evidence of encouragement by the OA, there is no evidence of any promises to be allowed to race without penalty. In order to facilitate ERT the opportunity to race, the OA took the unusual step of amending the Notice of Race to give the Jury the power to permit E3 to race notwithstanding she had no certificate.

20 As to the RMG, it has procedures to allow designs to be presented to it in confidence but this facility was not utilised by ERT. ERT failed to appreciate the RMG's authority in interpreting the Volvo Rule. It would have been helpful if the RMG had informed ERT in writing after the Lanzarote visit in early August that the 'repaired' keel was still not compliant, but it seems their attention turned to collaborating with the Organising Authority

in finding a way for E3 to be able to race with a non-compliant keel. However, not informing ERT definitively that their keel was still not compliant did not amount to telling them it would be acceptable and does not mitigate ERT's responsibility to ensure that their boat is compliant in all respects.

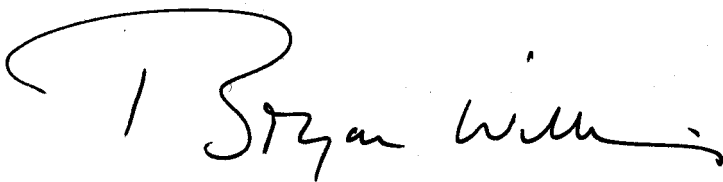
21. It is a fundamental requirement that to be eligible to race, a boat must have a valid measurement certificate. The fact that E3 did not have a certificate was, in the main, due to her own decisions.

DECISION (published on 10<sup>th</sup> October 2008)

22 The Jury is satisfied that the Application to Re-open fails to satisfy either of the two necessary requirements.<sup>5</sup>

23 Furthermore, the Jury has taken the opportunity to review the whole case and the degree to which ERT acted to mitigate the problems of first one and then a second keel being non-compliant. In light of this review, the Jury confirms that it considers the penalty imposed is appropriate in this case.

24 The Application to re-open is therefore refused.

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

Bryan Willis  
Chairman

Jury: Mats Bjorklund, Shane Borrell, John Doerr, David Tillett, Bryan Willis.

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<sup>5</sup> Racing Rule 66: 'The protest committee may reopen a hearing when it decides that it may have made a significant error, or when significant new evidence becomes available within a reasonable time ...