Arbitration CAS 2012/A/2917 British Paralympic Association (BPA) v. International Association for Disabled Sailing (IFDS) & Norwegian Olympic and Paralympic Committee (NIF), award of 11 June 2013

Panel: The Hon. Michael Beloff QC (United Kingdom), Sole Arbitrator

Sailing
Sanction for unauthorised cleaning work done on a boat during a Paralympic sailing competition
Independence and impartiality of judges
Establishment of bias through the size of the penalty
CAS jurisdiction with regard to decisions related to technical rules as constituted in the applicable regulations

1. **It is expressly stated in 63.6 of the Racing Rules of Sailing (RRS) that a member of the protest committee (international jury) who saw the incident which has formed the subject of a protest may give evidence and so have a dual role as witness and judge. Whatever might be the general law as to the requirements of independence and impartiality, a hallowed practice which becomes a necessity given the limited number of appropriate international jurors at the Paralympics, i.e. seven, with a quorum of five should not be stigmatised as unlawful.**

2. **Bias cannot simply be inferred from the size of the penalty even if there is unchallenged evidence that this was by far the most significant penalty imposed at the Paralympics, if it can be shown that the adjudicating body genuinely thought that, by using the discretionary penalty guidelines at disposition, it had conscientiously reached a consistent result.**

3. **CAS should decline jurisdiction if the decisions appealed against, whether in the view of others right or indeed wrong, were related to technical rules as constituted in the applicable regulations.**

1. THE APPEAL

1.1 This is an appeal ("the Appeal") by the BPA against a series of decisions ("the Decisions") made on 5th and 6th September 2012 by an International Jury ("IJ") of the IFDS during the three-person keelboat (Sonar) Sailing competition ("the Competition") at the London 2012 Paralympic Games ("the Event"). The Decisions resulted in a 4 point penalty ("the Penalty"). In absence of the Penalty the British team would have won the Bronze medal for the Event. In consequence of the Penalty the Bronze medal was awarded to the Norwegian team.

2. THE PARTIES

2.1 The British Paralympic Association ("BPA" or "the Appellant") is the governing body ("NOC") for British Paralympic Sport. The International Association for Disabled Sailing ("IFDS" or the "First Respondent") is the international governing body for disabled sailing. The Norwegian Olympic and Paralympic Committee and Confederation of Sports ("NIF" or "the Second Respondent") is the governing body for Norwegian Olympic and Paralympic Sport ("NOC"), and was joined as a party to represent the Norwegian team because of the potential effect on the latter's standing if the appeal succeeded.

3. THE BASIC FACTS

A. Background

3.1 The Sonar class of boat is a 3 person keelboat whose hull is manufactured from glass reinforced plastic with an external Gel coat finish. It is 7.0 metres long (23 feet) and 2.4 metres in beam (7 feet 10 inches). Its mainsail area is 18.2 square metres (196 square feet) and its jib sail area is 5 square metres (54 square feet). The Sonar has featured as a full Paralympic Class since the Sydney Olympics in 2000.

3.2 The 3 person crew competing in the Sonar class at the Event for the Paralympics GB Team ("the GBR Sonar Team") were: John Robertson (helm and skipper) Stephen Thomas (crew) and Hannah Stodel (crew). Their coach was Mark Rushall. Their bosun was Simon Hiscocks, himself a former Olympic sailor and specialist in boat preparation. Their manager was Stephen Park. The GBR Sonar team had represented Great Britain at the 2004 and 2008 Paralympics.

3.3 During the Event, the Sailing disciplines took place within Portland Harbour. 14 boats contested the competition regatta for the Sonar class, each representing a separate national Paralympic committee.

3.4 The competition format was a series of 11 races to be sailed during the period 1- 6 September 2012. For the first 10 races each of the boats were to take part, with the final medal race (race 11) would involve the top ten placed boats only.

In fact, a lack of wind caused the cancellation of the final medal race.

3.5 During the course of the competition, the Sonar boats were normally to remain in the water. Accordingly, checks of the condition of the boats would normally be made from within the water on a daily basis by support personnel such as a bosun.

B. September 4th

3.6 At approximately 08.30, on 4 September 2012, Mr Hiscocks, *"swam the boat"*, in order to carry out a routine check for damage and to wipe down the GBR Sonar Boat ("the GBR Boat"), in the water with a cleaning rag.

3.7 During the course of his inspection, Mr Hiscocks found roughness indicating damage to the keel of the boat.

3.8 After the day's sailing in accordance with the SI Rules, Mr Hiscocks completed an (obviously misdated) written Equipment Replacement Request ("ERR") asking for *"Permission to lift GBR damage to the keel"* and providing the reason *"There appears to be damage to the bottom of the keel"*.

3.9 The ERR was submitted to the Equipment Inspection Committee ("EIC") and approved by Mr Eugene R. Hinkel, the American International Measurer ("IM") and International Technical Officer for the Sonar Class, (who did not however sign the ERR form until at 17.45).

3.10 At around 15.43 hours Ms Gilly Foulds from the EIC's office telephoned Mr Hiscocks and informed him that permission had been granted to haul out the boat.

3.11 At approximately 15.45 hours, an EIC Representative also informed Ms Gemma Suggitt, the Beach Master, of the haul out permission, and she arranged for the crane driver to undertake the operation.

3.12 At approximately 16.20-30 hours, the boat was hauled out of the water by crane and placed on the hard standing area, which the Beach Master then cordoned off.

3.13 At or about that time, Mr Hinkel attended to inspect the boat together with Mr Hiscocks. Mr Park was also present. Some damage, evinced by dimpling, along the bottom and up the starboard side of the keel, was identified.

3.14 Mr Hinkel orally authorised Mr Hiscocks to proceed with repairing the keel and gave him some advice as to how best to do so. The terms upon which such authorisation was given is an issue in this appeal.

3.15 By about 17.30-40 hours, Mr Hiscocks had completed the repairs and was wiping the keel off. The extent to which such wiping was carried out on areas of the keel other than those repaired is also in issue in this appeal but there is no issue that other areas of the keel were wiped to some extent.

3.16 At this moment Mr Hinkel returned and called out to Mr Hiscocks, saying *"You can't do that"*. Nevertheless, Mr Hiscocks continued to wipe the keel ("the incident"). There is no issue in this appeal as to the substance of that reported instruction, although there are issues as to how Mr Hiscocks interpreted it, what else was said by Mr Hinkel, and the nature of Mr Hiscock's reaction.

3.17 After leaving Mr Hiscocks, Mr Hinkel passed the GB team container and had a brief discussion with Mr Rushall and Mr Park. Mr Hinkel expressed his displeasure that he had told Mr Hiscocks to *"stop wiping the keel"* but that the latter had continued to wipe it. Mr Hinkel felt that his instructions had not been followed. Mr Hinkel stated that as he was being observed by Bas Edmonds, a GBR International Technical Officer during the repair process, he felt it necessary to submit a report to the IJ since if he did not Mr Edmonds, who had already been at odds over Mr Hinkel's interpretation and application of the measurement rules might suggest that he was *"not doing his job properly"*.

3.18 At about 17.45 Mr Hinkel recorded his version on the obverse side of the ERR ("the document").

> *"The Sonar was lifted for instructions and there were some small holes in bottom of keel and 3 on star side up toward oft edge perhaps 200mm from edge. Permission was granted to repair but only those areas and said not to wipe down either hull or keel.*

> *I observed from a distance and noted the whole keel was wiped down with a rag. I went to Simon and told him to stop as only the repair area could be touched. He kept wiping the whole keel including the port side – I said stop twice more and he would not stop.*
>
> *This was against the permission granted".*

3.19 At about 19.00 Ralph Roberts, the International Jury Chairman, Mr Pat Healy, its Vice-Chairman, and Alan Baser, its Secretary, met with Mr Hinkel in the common area of the jury offices. Mr Roberts and Mr Healy decided that the Report, the accuracy of whose contents were then confirmed to them by Mr Hinkel, disclosed possible breaches of the SI Rules. Mr Roberts then asked Mr Healy to write and file a protest against the GBR Sonar Team under RRS 60.3.

3.20 At 19.30 Notice of Intent of the IJ (which served as the Protest Committee at the event) to Protest the GBR Boat under SI, 3.1 and SI.27 was posted on the Official Notice Board. It indicated that the hearing would take place at the end of racing time on 5 September 2012.

3.21 At 20.08 Mr Healy drafted the Protest against the GBR Boat referring to breaches of Sailing Instruction ("SI") SI.3.1 and SI.27.

3.22 The Protest described the incident as follows:

> *"Based upon a written report by the chairman of the Equipment Inspection Committee, GBR was given permission to haul their boat to make repairs to their keel. The chairman reported that he observed additional work being done and the keel being cleaned. When told to stop the shipwright did not".*

C. September 5th

3.23 Before 8 the Protest form was collected by Mr Park who had also seen the posting on the official Notice Board.

3.24 Later on the same morning, the British team and Mr Park discussed how to deal with the protest. It was agreed that the best tactic was not to take issue with Mr Hinkel's document but instead to be conciliatory. In consequence Mr Park would represent the British Team and call no evidence to dispute Mr Hinkel's version of events but rather apologise for any misunderstanding.

3.25 During the main part of the day Races 8, 9 and 10 took place.

3.26 Between approximately 15.15 and 16.30 the hearing of Protest No.21 (so identified by its place in the sequence of protests during the event) took place. The IJ consisted of Mr Roberts, Dr Lynne Beal (who acted as scribe in writing up the Report on this and subsequent protests involving the GBR Boat); Mr Azzoug, Mr Sleutel and Mr Valentino. Mr Healy, a US citizen, excused himself on the basis that the outcome of Protest 21 might work to the advantage of the US team, given the then standings of the various teams.

3.27 Mr Park read out a statement from his iPad:

"1. Apologies that we are here taking up everyone's time this evening. We feel bad that GBR are in the room having to defend our actions, especially for this one off the water issue. ***Apologies to Gene that GBR has put you in the position where you felt obliged to report our Bosun's actions to the Jury. We acknowledge that you strive hard to ensure there is fair racing across the fleet****.*

2. ***GBR do not dispute the report as provided by the Measurer to the Jury.***

3. GBR would like to offer the following mitigation:

(a) the verbal instructions of the Measurer were that the keel could be dried and repaired, however the hull was not to be touched.

(b) the hull was lifted in the crane and the Measurer chose to stay and observe the work. In an effort to effect the repair as quickly as possible, for convenience of all involved, the GBR Bosun used the simplest and quickest method available.

(c) the hull was clean when it was lifted.

(d) the hull is cleaned every morning before racing.

(e) ***the Bosun did wipe the keel following the repair, to remove standing dust & debris … being primarily on the bottom of the keel.***

(f) ***both sides of the keel were wiped, as there was repair debris on both sides, due to the repair being primarily on the bottom of the keel.***

(g) the hull was wiped with a dry rag, containing no polish etc, which we believe the Measurer will confirm.

(h) the Bosun misunderstood the gravity of the measurers command, and felt he was just completing the job he was given permission to do.

(i) importantly we do not think there was any performance advantage gained.

(j) with hindsight, if we had thought this was going to be an issue we would have dropped the boat back into the water and completed the job afloat.

(k) it appears that on this occasion our Bosun made an error of judgment. I would like to confirm to the jury that this is extremely out of character. As a double Olympic Medallist and someone who fulfilled the same role in the 2012 Olympic team, Simon is well acquainted with the requirements of fair play & sportsmanship.

Finally, I would like to reiterate my earlier apology for any misunderstanding" (the Sole Arbitrator's emphasis).

3.28 During the hearing only Mr Hinkel gave evidence to the IJ. Although that evidence added to those shown in the document facts which further emphasised Mr Hiscocks resistance to his instructions, consistent with the British Team's agreed forensic stance, Mr Park made no application to adjourn the hearing or to call rebuttal evidence.

3.29 The IJ then imposed the Penalty, the main subject matter of this appeal.

The Official Communication of Protest No. 21 stated, *inter alia*,

Protest Details: *SI.3 and 27.*

Facts Found
GBR asked for the measurer's permission to haul the Sonar to effect repairs to perceived damage to the bottom of the keel. GBR complied with the instructions at the time of haul-out as the measurer inspected the keel. The measurer provided consent for GBR to effect repairs to the bottom of the keel, as well as to three marks on the starboard side. The crew was present for the inspection and instructed their bosun to make the repairs.

Once the bosun completed the repairs he began to wipe the whole keel including the port side. The measurer made three requests for the bosun to stop wiping the keel, but he kept wiping. After a second request to stop, the measurer explained that he might have to make a report if he did not stop. The bosun replied, "Go ahead and make your report" and continued. After the third request, the bosun explaining that he had to do his job and he continued wiping until he finished the job.

The measurer's opinion is that there was no performance advantage gained by wiping the keel.

Conclusion
GBR complied with the application procedure to effect the repair under EIR 3.

GBR did not affect repairs beyond those permitted by the measurer under EIR 3.3. The bosun failed to comply with the reasonable request by the measurer to stop wiping other areas of the keel, in breach of SI 3.

The breach was deliberate. Mitigating circumstances are that GBR does not dispute any aspect of the measurer's report, and acknowledges that the bosun made an error of judgement.

Rule(s) applicable:
SI 3, EIR 3.1, RRS 64.1(d).

Decision
The Jury's discretionary scoring penalty to GBR is 30% of Boats, ie 4 points in race 7. The race closest in time to the incident.

Decision – short:
Penalty to GBR 4 points in race 7.

3.30 After Protest Hearing 21, according to Mr Robertson, Mr Hinkel approached him and said that *"he had to report it"*, but in doing so he'd *"expected only a warning or a 1 point penalty"*. Mr Hinkel then said *"You shouldn't have broken a rule"*, to which Mr Robertson replied: *"We didn't"*.

3.31 At 17.44, Ms Slodel made a request for redress which stated:

> *"We believe we have been penalised as a result of an omission of the Race Committee (EIC). Having complied with the application procedure to effect repair to our keel, we were given no written "terms" in accordance with SI 27.1. At this point we left the job in the hands of the bosun: we had no reason to give him any particular instructions as there were no "terms".*
>
> *As a result of Protest No.21 we have been penalised through no fault of our own".*

Ms Slodel presented the argument herself but called no evidence.

3.32 At about 21.50 the Request for redress was denied by the IJ which was then (and thereafter) afforced by Mr Healy, it being now apparent that the outcome of the Protest could not advantage the US team.

3.33 The Official Communication of Protest No. 25 stated *inter alia*:

Protest Details:
Request for Redress

Facts Found
GBR made a written application to haul out the boat and effect repairs to their keel. The EIC measurer gave oral permission to haul out the boat and to make repairs as soon as they came ashore. This has been the EIC practice throughout the Paralympic Sailing Competition. GBR hauled out the boat and effected the repairs, based on oral, rather than written terms, as directed and monitored by the measurer. GBR was penalized under SI 3 when her bosun who was making the repairs failed to comply with reasonable requests from the EIC measurer.

Conclusion
GBR agreed to, and followed the oral terms, rather than requesting written terms as specified in SI 27.1. It was the breach of SI 3, and not the omission of the EIC measurer with respect to SI 27.1, that made her score significantly worse.

Rule(s) applicable:
SI 3, 27.1, RRS 62.1(a).

Decision:
Request for redress is denied.

Decision – short:
Redress denied.

3.34 At 19.02 Mr Park submitted a request to re-open the Hearing of Protest No.21. He set out the ground for his request as follows:

"Grounds to Reopen – Sonar GBR
The Protest was invalid.
The protest was brought by the International Jury based on a report from the Equipment Inspection Committee. There is no such mechanism permitted at the Paralympic Games.
Usually, an Equipment Inspector would report a breach to the race committee under RRS 78.3. However, as for the Olympic Games, this rule is deleted by SI 14.4. For these Games the EIC are deliberately given the direct right of protest under SI 14.3, SI 14.3 is very clear that the only other option for the EIC is for breaches of "other rules" and these must be reported to the Race Committee for their consideration, not to the International Jury.
The EIC did not protest. The EIC did not make any report to the Race Committee. As the EIC failed to protest the boat within the time limit, this became an invalid protest. It is not for the International Jury to overcome that error. This is identical to a Race Committee failing to protest a boat for not sailing the course correctly within the specified time limit. It is no for the protest committee to validate that protest by becoming the protestor.
RRS 63.5 requires a protest committee to consider validity and if the protest is invalid, to close the hearing. This they failed to do and is an error that justifies a re-opening of the hearing under RRS 66.
The "protest committee" may act under RRS 60.3(a) based on a report, but from an invalid protest. It follows that the decision of the International Jury to protest Sonar GBR was not based on the rules of the event and was therefore an error.

Protest for a Breach of SI 3.1 and SI 27.1
SI 3.1 addresses "Athletes". Athletes are synonymous with "Competitors". SI 1.4 is clear that an athlete is a person competing in the event. The person who failed to comply with the instruction from the Race Official was not an Athlete. It follows that no instruction was given to an athlete. Therefore SI 3.1 cannot be applied to this case. Penalising an Athlete for such a breach is therefore an error by the protest committee and justifies a re-opening of the hearing under RRS 66.
SI 27.1 is clear that when a boat is given permission to haul out for repairs, it must comply with the written terms specified by the EIC. As no written terms were ever given to the boat, it follows that this SI cannot be broken.

The Application of Discretionary Penalties
It is agreed that this breach initially falls into Band 0. It seems that the penalty was determined on the grounds that the breach was deliberate. This is not consistent with the statements by the Equipment Inspector or any party to the hearing. This was clearly a misunderstanding and not deliberate. The term deliberate breach covers situations where a boat is aware that they are breaking a rule and then either do so, or continue to do so. This is not the situation.
In the light of there being no written terms of haul out and repair as required by SI 27, it is very hard to find that a breach is deliberate. In fact, this error by the EIC is a mitigating circumstance that justifies reducing any penalty, not increasing it.
There is no rule within the EIR that prevents a boat from cleaning a hull. So, in the absence of any written terms the only way that an athlete would be aware of this restriction is via a verbal instruction. Verbal

instructions are notoriously misunderstood. Again, this is grounds for decreasing the penalty, not for increasing it.
We believe therefore that the International Jury have made an error in deciding the appropriate penalty and this justifies a re-opening under RRS 66".

Mr Park presented the argument himself but called no evidence.

3.35 The IJ denied this first Request for re-opening.

The Official Communication of Protest No. 26 stated, *inter alia,* as follows:

Protest Detail
SI.3 61A 3.1 RRS 64 (1(8).

Facts Found
GBR made a submission to the International Jury, alleging that the jury had made significant errors in Protest 25, as follows:
The protest was invalid because the jury erred in protesting the competitor based on a report from the EIC;
The bosun's actions could not result in a penalty to the athlete;
No written terms of the haul out and repairs were given to GBR;
The jury erred in determining that the breach was deliberate, in deciding the appropriate penalty.

Conclusion
SI 14.4 did not amend rule 60.3 to deny the international jury the right to protest a boat based on a report. The report from the EIC was not a request for redress, nor was it an invalid protest, nor a report from an interested party. Therefore, the failure of the EIC to protest the boat did not prevent the international jury from filing a protest based upon an EIC report (rule 60.3(a)).

Athletes have the responsibility to follow the rules of the Sailing Competition. They may delegate authority for other people to perform tasks, but they are not relieved of their responsibility that the rules are follows.
The measurer and GBR agreed to haul the boat and commence the work to effect repairs on the basis of verbal instructions. This does not invalidate the protest or remove the athlete's responsibility that the rules are followed.

The International Jury follows the principles given in the "Information for Athletes and Race Officials Regarding Discretionary Penalties (DP)" to determine the penalty given. This document was posted on the Official Notice Board Based upon the facts and conclusions of the original hearing, the International Jury did not make an error in deciding the discretionary penalty.

Rule(s) applicable:
66

Decision:
The international jury is not satisfied that it has made a significant error. The request to re-open is denied.

Decision:
Request to reopen is denied.

D. September 6th

3.36 At about 8.36 Mr Park made a further request to reopen. The grounds for his request (based essentially, if not exclusively, on construction of S21 and RRS rules) were set out as follows:

> *"**Grounds for Re-Opening of Protest No.26: Sonar GBR***
>
> 1. *The Protest is invalid. The EIC did protest through their submission of their report to the Race Committee. This report alleges that an allegation was made under RRS Rule 61.2 that a boat had broken a rule & therefore this report was indeed "an Allegation of a breach of rule" as defined in the Racing Rules of Sailing, and was therefore a protest, but it was not a valid protest as it did not comply with the requirements of RRS Rule 61. RRS Rule 60.3(a) permits the International Jury to judge the validity of a protest as per RRS Rule 63.5 and not to take over that protest and become the protestor.*
>
> 2. *The Race Committee have made an error in applying SI 3.1 rather than the Coach Boat Regulations which, as outlined in Notice of Race clause 18.4, govern "Coaches and other support personnel". Sanctions exist under clause 1.4 of the Coach Boat Regulations for support staff to be penalised for improper actions as determined by the International Jury. There are many examples as previous Championships and Games of actions taken by the International Jury against support staff under the Coach Boat Regulations where it is accepted that their actions are in breach of the Event Regulations, but did not materially affect the Competition.*
>
> 3. *The International Jury have made an error in the application of discretionary penalties. It is agreed by the International Jury that this breach initially falls into Band O. There was no performance advantage gained by the breach was deliberate. This is not consistent with the statements given by the Equipment Inspector, nor any party to the hearing. This was clearly a misunderstanding and not deliberate and the misunderstanding was caused by the failure of the EIC to provide written terms for the repair as they are required to under SI 27. The term "deliberate breach" covers situations where the boat is aware that they are breaking a rule and then either do so, or continue to do so. This is not the situation.*
>
> 4. *The penalty issued is inconsistent with current custom and practice as determined by the actions of International Juries when faced with similar situations at similar events. Protest No.61 from the London 2012 Olympic Games is one such example".*

3.37 The IJ rejected this second request for re-opening. The Official Communication for Protest No.27 stated, *inter alia*,

> ***Protest Details:***
> *Request to reopen SI 3.1, Rule 61, Rule 60.3*

Facts found:
GBR made a request to reopen Protest 21, alleging that the International Jury had made significant errors, as follows:

- *the protest was invalid because the jury erred in protesting the competitor based on a report from the EIC*
- *the international jury applied SI 3.1 rather than the Coach Boat Regulations in protesting and penalizing GBR*
- *the discretionary penalty was not applied correctly.*

Conclusion
SI 14.3 permits the EIC to protest a boat for a breach of a Class Rule, RRS 43, rules related to personal equipment, or a rule of the EIR. The EIC report alleged a breach of SI 3.1 and SI 27. This SI did not amend RRS 60.3(a), thus the International Jury may protest a boat based on a report from any source who is not an interested party, including the EIC.

Sailing instructions were not deleted by any additional rules governing the Sailing Competition. There was no breach of the Coach Boat Regulations that would have warranted a hearing or penalty under Coach Boat Regulation 1.4. The International Jury finds that it made no mistake in its application of SI 3.

The International Jury followed the principles given in the "Information for Athletes and Race Officials Regarding Discretionary Penalties ("DP") to determine the penalty. The International Jury finds that it did not make an error in deciding the discretionary penalty.

Rule(s) applicable:
66

Decision
The International Jury finds that it did not make a significant error. The request to re-open is denied.

3.38 Later in the morning Mr Park discovered that Gemma Suggitt had been present at the interchange between Mr Hiscocks' and Mr Hinkel and accordingly made a yet further application for reopening of the hearing.

The grounds for this request (this time based on "new evidence" i.e. that of Ms Suggitt) were set out as follows:

"GBR Sonar has new evidence that we did not have at the time of the initial hearing.

During the initial hearing GBR Sonar stated it had no reason to dispute the testimony of the Measurer. We stated that the GBR Bosun made an error of judgment as he misunderstood the inspection, the seriousness and the gravity of the IM instructions. We now have evidence that the Event Beach Master was present, and observed the entire incident. The Beach Master's evidence will inform the jury that:

1) She did not believe the Bosun did any more work on the boat than the clear instructions of the IM.

2) It was reasonable for the Bosun to misunderstand the IM instructions as the tone of the instructions were very chatty in nature and not firm, clear commands that were deliberately being ignored".

3.39 Although on Mr Healy's initiative both Mr Hiscocks and Ms Suggitt gave evidence, the IJ rejected this third request for re-opening. The Official Communication for Protest No.28 stated, *inter alia*:

Protest Details: Request to re-open hearing RRS66. To be heard with case 27

Event: ***Race:*** *7*
3-Person Keelboat (Sonar)

Protestor*: GBR* ***Protestee****:*

Facts found*:*
GBR requested a re-opening of Protest 21 to present new evidence that two witnesses could present Gemma Suggitt the Beach master was available at the time that GBR learned of the protest on September 4, and was not approached by GBR to serve as witness until September 6 around 1000 hours.
Simon Hiscocks learned of the protest. At the original hearing GBR elected not to call him as a witness to the hearing.

Conclusion*:*
The evidence of these two witnesses was available to GBR prior to the time of the original hearing. The requirement of rule 66 for a reopening to hear new evidence has not been met.

Rule(s) applicable*:*
66

Decision:
The request to reopen is denied

Decision – Short*:*
Reopening is denied.

3.40 Protests No.27 and 28 were heard at the same time; although the outcome was separately recorded.

3.41 On the same day Mr Park wrote a letter to the LJ giving of their intent to Appeal the decisions of the International Jury of the London 2012 Paralympics Sailing Regatta, in respect of Protest Numbers 21, 25, 26, 27 and 28 to CAS.

3.42 The final results of the competition (top six places) were as follows:

- the Dutch team won gold with 20 points;
- the German team won silver with 40 points;
- the Norwegian team won bronze with 42 points;
- the French team were in fourth place with 42 points; and
- the British team were in fifth place with 45 points;
- the USA team eventually finished in seventh place.

4. PROCEEDINGS BEFORE CAS

A. Written proceedings

4.1 On 7 September 2012 in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration ("CAS Code"), the Appellant filed its Statement of Appeal.

4.2 On 17 September 2012 in accordance with Article R51 of the CAS Code, the Appellant filed its Appeal Brief.

4.3 On 24 September 2012, the NIF filed a request for intervention according to Rule R41.3 of the CAS Code, to which the Appellant and First Respondent did not object.

4.4 On 11 October 2012 the Sole Arbitrator was appointed.

4.5 On 19 October 2012 the Sole Arbitrator issued Order of Procedure No.1 in which he accepted the request for intervention filed by the NIF mentioning that unless an objection from the Appellant and First Respondent it will be added as co-Respondent in the procedure, and ruled, *inter alia*, that the issue of jurisdiction raised by the Respondents could not be segregated from the merits and so stood over that issue until the full hearing. He also gave further directions for the appeal.

4.6 On 24 October 2013, without objection from the Appellant and the First Respondent in the prescribed deadline, the participation of the NIF as co-Respondent in the present procedure was confirmed by CAS.

4.7 On 16 November 2012 in accordance with Article R55 of the CAS Code, the First Respondent filed its Answer.

4.8 On 21 November 2012 the Second Respondent filed its Answer.

4.9 On 12 February 2012 the Sole Arbitrator issued Order of Procedure No.2 dealing with disclosure issues.

B. Oral presentation

4.10 In accordance with Article R57 of the CAS Code, the hearing took place on the 29 and 30 April 2013 at Sport Resolutions, London.

The following persons were present:

Appellant

Mr Michael McParland QC (Counsel)
Mrs Jeanette Hopkins (Solicitor)
Mrs Joana Welch (Solicitor)
Mr Simon Hiscocks (Witness)
Mr Stephen Park (Witness)
Mr John Doerr (Expert Witness)

Respondent

Charles A. Cook (Counsel)
Alastair Fox (Witness)
A. Lynne Beal (Witness)
Pat Healy (Witness)
Marianne Middelthon (Expert witness)

Second Respondent

Mr Niels R. Kiaer (Counsel)
Mrs Henriette Hillestad Thune (Lawyer)
Esben Slaatto (Witness)
Jim Capron (Expert Witness)

At the start and at the end of the hearing the parties confirmed their satisfaction respectively with the Sole Arbitrator's appointment and with his conduct of the proceedings.

5. THE POSITION OF THE PARTIES

5.1 The following outline is illustrative only and does not recite every contention of the parties. However every contention advanced by the parties, whether in writing (in formal pleadings and, in the Appellants case in a skeleton argument) or orally has been carefully considered by the Sole arbitrator.

5.2 The Appellant contended that:

* CAS has jurisdiction over the appeal on the proper interpretation of the IPC rules for London 2012 para 2.8.

* the IJ acted without jurisdiction. Whether the EIC s submission to the IJ was a report or a protest, it provided no basis under the rules for disciplinary action by the IJ.

* the IJ wrongly found the British team in breach of SI 3.1 which did not apply to support personnel but only to competitors; and, in so far, which is disputed, they also found them in breach of SI 27 could not properly do so since the British team were not in receipt of written instructions, a *sine qua non* of engagement of that rule.

* the IJ in any event imposed a penalty which was outwith the Guidance and disproportionate

* the IJ wrongfully and contrary to the RSS rejected the Appellants request for redress and/or re-opening

* the IJ acted in bad faith and with bias.

And accordingly requested that the appeal to be allowed, the penalty be annulled, and the bronze medal re-allocated to the British team.

5.3 The First Respondent contended that:

* CAS had no jurisdiction over the appeal on the proper interpretation of the IPC rules for London 2012 para 2.8.

* the IJ had jurisdiction to act on a document which was itself a report, and not a protest

* Even if the IJ wrongly interpreted SI 3.1(which was not formally conceded) the breach properly found of SI 27 provided a sufficient basis for the penalty imposed

* the penalty was consistent with the Guidance and not disproportionate

* the rejection of the Appellants requests for redress and/or reopening were entirely within the rules

* there was no evidence of bad faith or bias on the part of the IJ

And accordingly requested CAS to determine that it had no jurisdiction over the appeal, alternatively to dismiss the appeal.

5.4 The Second Respondent contended that

* CAS lacked jurisdiction]

* The Protests were properly before the IJ

* The Penalty was correctly imposed.

and adopted the submissions and request of the First Respondent.

6. JURISDICTION

6.1 The extent of CAS's jurisdiction is defined by the IPC Handbook Paralympics Charter.

6.2 This provides, so far as material, as follows:

> ***2 General Rules and Principles for Participation in the Paralympic Games***
>
> ***2.1 Eligibility Code Compliance***
>
> *To be eligible for participation in the Paralympic Games an individual must comply with, observe and abide by the rules of IPC. Every competitor, team official and Games official shall observe, comply and abide by the rules and regulations outlined on the IPC Eligibility Code and shall sign off the IPC Eligibility Form.*
>
> *All competitors, coaches, trainers or other team officials must comply with all provisions of the IPC Eligibility Code including – but not limited – to:*
>
> ……
>
> - *Accept binding arbitration of the Court of Arbitration (CAS) for matters not related to sport technical rules.*
>
> ***2.8 All disputes related to sports technical rules, such as competition, field-of-play and Classification are under the authority of the respective IPSFs and IPC, and shall be resolved by IPC, whose decision on these matters is final and enforceable.***
>
> ***Any other disputes arising on the occasion of, or in connection with, the Paralympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration****.*
>
> *All competitors and team officials of NPC Delegations who participate in the Paralympic Games by submitting their application for accreditation agree on the arbitration bodies as stipulated above.*
>
> ("the Handbook") (the Sole Arbitrators emphasis).

6.3 Furthermore, in order to obtain accreditation, each athlete and team official was required to execute an IPC Eligibility Form. The IPC Eligibility Form required each participant to, *inter alia*, comply with each *"Sports Technical Rules … of the sport in which (he/she)"* participated. The IPC Eligibility form also contained the following:

*"**Acceptance of Sports Technical Supreme Authority***

I recognise and accept that the sports technical rules, being all rules which relate to competition, field of play and classification, for my sport during the London Games are under the authority of the relevant International Paralympic Sport Federation ("IPSP") for the sport (or sports) that I am competing in and that ***any disputes which arise shall be resolved in accordance with the procedures set out in the respective sport technical rules and regulations.***

I acknowledge and accept that decisions relating to the sports technical and classification rules are not subject to further appeal beyond the decision made in the sport-specific appeal processes as set out in the respective sports technical rules *or classification appeal processes as set out in the Classification Rules applicable to the London Games in which I am competing.* ***I shall not institute any claim, arbitration or litigation, or seek any other form of relief in any other court or tribunal in relation to such decisions.***

Acceptance of binding arbitration

I acknowledge and accept any dispute outside the realm of the sports technical rules arising during the London Games shall be resolved through arbitration and submitted exclusively to the Court of Arbitration for Sport (CAS) whose decisions shall be final, binding and not capable of appeal*. Any such dispute shall be determined in accordance with the procedure laid out in the CAS Code for Sports-related Arbitration or the CAS Ad Hoc Rules for the London Games, if such Ad Hoc Rules are adopted and in place. If Ad Hoc Rules are adopted for the London Games they will be publicised on the IPC website and shall take precedence over the standard CAS Arbitration Code".*

("the Eligibility Form") (the Sole Arbitrator's emphasis).

6.4 It is axiomatic that CAS cannot arrogate to itself a jurisdiction which it does not otherwise enjoy by agreement of parties or pursuant to regulations binding upon them.

6.5 Pursuant to the Handbook and Eligibility form CAS had exclusive jurisdiction over disputes arising on the occasion of or in connection with the Paralympic Games other than those related to sports technical rules ("the proviso"). As an exception to that exclusive jurisdiction, as a matter of general principle, the proviso must be construed narrowly.

6.6 In this case, as in the case of CAS 2006/A/1142 (where, however , differently formulated provisions were in play), the exercise is to discern where the boundary lies between that which is, and that which is not justiciable by CAS pursuant not only to that general principle but also to a purposive construction of the Handbook and Eligibility Form.

6.7 In the Sole Arbitrator's view both the Handbook and the Eligibility Form drew a distinction between decisions taken in application of the technical rules of the sport, which were purely matters for the internal procedures of the relevant IPSP and decisions taken in purported application of such technical rules, where those decisions have no foundation in the rules at

all, or are the product of bias or bad faith. To conclude otherwise would indeed give competitors *"no recourse in cases of grossly unfair arbitrary or illegal decisions under those rules"*. CAS 2006/A/1142 at para 87.

6.8 The Sole Arbitrator construes the policy underlying the salient parts of the Handbook and Eligibility Form as being to allow bodies' expert in the sport the right to construe and apply the rules which govern the sport, but not wholly to ignore them or to construe or apply them in bad faith see too CAS OG4/009 para 24. However he recognizes that the bodies internal to the sport must, within their jurisdiction be able to make mistakes, even in relation to the construction of particular rules, without being liable to CAS review, unless acting *ultra vires* in the manner described. The Sole Arbitrator notes that the ISAF Judges Manual (2011) at 1.3 (albeit in the context of an official's decision) qualifies the CAS principle of non-interference with technical matters when the decision under challenge is marked by fraud or arbitrariness or corruption (The Sole Arbitrator does not detect any difference between his analysis and the endorsement given informally by CAS letter to the IPC dated 17 August 2012 responding to IPC's enquiry dated 16 August 2012, about the correctness of the latter's guidelines for the event, since the Guidelines said only that *"sport technical decisions taken under the relevant IPSF Sport rules for each sport … are excluded"* which begs the question as to what is meant by the phrase *"**under** the relevant IPF Sport rules"*).

6.9 The Sole Arbitrator's unwillingness to rule on the issue of jurisdiction at the outset was a consequence of his inability in advance of a full hearing to determine whether the appeal engaged only technical rules (which he accepts include modes of resolving issues arising thereunder) or had a wider reach.

6.10 If, for example, (setting aside the particular case of bad faith) on a true construction of the rules, the matter could not properly have been brought before IJ (as distinct from some other body) or if the sole basis relied on to justify the penalty was an alleged breach of a manifestly inapplicable rule, the issue of whether such circumstances showed that the IJ was acting outside its jurisdiction or merely erring within it require resolution. The Sole Arbitrator therefore postpones his consideration of the jurisdictional issue until he has found and analysed the facts germane to that issue.

7. ADMISSIBILITY

If CAS has jurisdiction over the Appeal, its admissibility is not otherwise in issue. No internal remedies fell to be exhausted, and the Appeal is timely.

8. SCOPE OF REVIEW

If CAS has jurisdiction, the Sole Arbitrator has *"full power to review the facts and the law"*. R57

9. APPLICABLE LAW

A. Competition

(1) Sailing Instructions (SI)

London 2012 Paralympic Sailing Competition

These Sailing Instructions (SIs) shall apply from 22 August 2012 until 6 September 2012

In all sections the following abbreviations apply:

SP	*Rules for which a standard penalty may be applied by the Race Committee*
DP	*Rules for which the penalties are at the discretion of the International Jury*
NP	*Rules that are not grounds for protest by a boat*

1. Rules

1.1 The Sailing Competition will be governed by the rules as defined in The Racing Rules of Sailing (RRS).

…….

3. Code of Conduct [DP]

3.1 Athletes shall comply with any reasonable request for a Sailing Competition official.

.....

27. Haul out restrictions [DP]

Keelboats shall not be hauled out during the Sailing Competition, except with according to the terms of prior written permission of the EIC.

……..

(2) Notice of Race ("NoR")

1 Rules

1.2 The Sailing Competition will be governed by the rules as defined in the Racing Rules of Sailing (RRS).

…….

1.4 In all rules governing this competition both athlete and competitor mean a person competing in the event.

…….

4 Eligibility and Entry

4.1 Athletes, coaches, trainers and other team officials shall comply with the IPC Handbook, as well as the IFDS rules, in order to be eligible for participation in the London 2012 Paralympic Sailing competition, and shall be entered by a National Paralympic Committee (NPC).

……

12 International Jury

12.1 An international jury will be appointed in accordance with RRS 91(b). Its decisions will be final, as detailed in RRS 70.5.

(3) Equipment Inspection Regulations (EIR)

3 Repair and replacement of boats and equipment

3.1 Applications for alterations, repairs or replacement shall be made on the forms available from the Sport Information Desk or the Jury office reception and shall be submitted when completed to the Jury office reception.

……..

3.3 Repairs: athletes wishing to make repairs to boats or equipment after they have passed through equipment inspection shall make an application to the EIC. If approved, the EIC will arrange a time for such repairs to be inspected.

……

(4) The Racing Rules of Sailing for 2009-2012 ("RRS")

3 ACCEPTANCE OF THE RULES

By participating in a race conducted under these racing rules, each competitor and boat owner agrees

(a) to be governed by the rules;
(b) to accept the penalties imposed and other action taken under the rules, subject to the appeal and review procedures provided in them, as the final determination of any matter arising under the rules; and
(c) with respect to any such determination, not to resort to any court of law or tribunal.

B. Procedure

ANNEX 1
Racing Rules of Sailing: CURRENT EDITION (2012)
Amended to reflect changes introduced by the Sailing Instructions for the London 2012 Paralympic Sailing Competition

PART 5
PROTESTS, REDRESS, HEARINGS, MISCONDUCT AND APPEALS

SECTION A
PROTESTS; REDRESS; RULE 69 ACTION

60 RIGHT TO PROTEST; RIGHT TO REDRESS RULE 69 ACTION

60.3 *[International Jury] may*

(a) protest a boat, but not as a result of information arising from a request for redress or an invalid protest, or from a report from an interested party other than the representative of the boat itself.

60.4 The EIC [Equipment Inspection Committee] may protest a boat for breach of a Class Rule, RRS 43, rule relating to personal equipment or a rule of the EIR. The EIC may report an alleged breach of other rules to the Race Committee.

61 PROTEST REQUIREMENTS

61.1 Informing the Protestee

……..

(b) protest committee intending to protest a boat shall inform her as soon as reasonably possible.

61.2 Protest Contents

A protest shall be in writing and identify

(a) the protestor and protestee;
(b) the incident, including where and when it occurred;
(c) any rule the protestor believes was broken; and
(d) the name of the protestor's representative.

However, if requirement (b) is met, requirement (a) may be met at any time before the hearing, and requirements (c) and (d) may be met before or during the hearing.

62 REDRESS

62.1 *A request for redress or a protest committee's decision to consider redress shall be based on a claim or possibility that a boat's score in a race or series has, through no fault of her own, been made significantly worse by*

(a) an improper action or omission of the race committee, protest Committee, ***equipment inspection committee*** *or organizing authority, but not by a protest committee decision when the boat was a party to the hearing;*

……

62.2 *The request shall be in writing and be delivered to the race office no later than the protest time limit or two hours after the incident, whichever is later. The protest committee [international jury] shall extend the time if there is good reason to do so.*

All parties to the hearing, or a representative of each, have the right to be present throughout the hearing of all the evidence. …. Any witness, other than a member of the protest committee, shall be executed except when giving evidence.

63.4 Interested Party

A member of a protest committee [international jury] who is an interested party shall not take any further part in the hearing but may appear as a witness.

63.6 Taking Evidence and Finding Facts

The protest committee [international jury] shall take the evidence of the parties to the hearing and of their witnesses and other evidence it considers necessary.

A member of the protest committee [international jury] who saws the incident may give evidence. A party to the hearing may question any person who gives evidence. The committee [international jury] shall then find the facts and base its decision on them.

64 DECISIONS

64.1 Penalties and Exoneration

(a) When the protest committee [international jury] decides that a boat that is a party to a protest hearing has broken a rule, it shall disqualify her unless some other penalty applies. A penalty shall be imposed whether or not the applicable rule was mentioned in the protest.

65 INFORMING THE PARTIES AND OTHERS

65.1 *After makings its decision, the protest committee [international jury] shall promptly inform the parties to the hearing of the facts found, the applicable rules, the decision, the reasons for it, and any penalties imposed or redress given.*

66 REOPENING A HEARING

The protest committee [international jury] may reopen a hearing when it decides it may have made a significant error, or when significant new evidence becomes available within a reasonable time. It shall reopen a hearing when required by the national authority under rule F5. A party to the hearing may ask for a reopening no later than 24 hours being informed of the decision.

C. Penalties

2012 Paralympic Games Sailing Competition

Information for Athletes and Race Officials Regarding Discretionary Penalties (DP)

When the International Jury has discretion to decide the appropriate penalty for a breach, the penalties may range to disqualification. However, the following guidelines will be observed in assessing penalties. If the International Jury decide that a penalty greater than DSQ may be appropriate, then they will consider initiating action under rule 2 or rule 69.

Penalties are divided into 5 bands:

Band 0 – zero penalty
Band 1 – 0-10% (mid point 5%)
Band 2 – 10-30% (mid point 20%)
Band 3 – 30-70 (mid point 50%)
Band 4 – DSQ/DNE

Questions to be considered when deciding the appropriate initial penalty band include:

1(a) Did the breach compromise the safety of competitors or race organizers?
1(b) Did the boat gain a competitive advantage through her breach?
1(c) Could the breach bring the sport or the organization into disrepute?
1(e) Was anybody inconvenienced?

The following questions are then asked to determine if there is cause to increase or decrease the band or to maximise/minimise the penalty within the band.

2(a) Was the breach deliberate? Increase band at least one level – and consider RRS *2.*
2(b) Was there a good reason or justification for the breach? If yes, consider Band 0.
2(c) Was there any attempt to conceal the breach? If yes, increase band at least one level and consider RRS *2.*
2(d) Was the breach a careless or cavalier disregard of the rules? Increase to top of band or one level.
2(e) Has the breach been repeated? Consider increasing the penalty one band.
2(f) Was the breach reported by the competitor? If so, it may justify going to bottom of band or one band lower.

The following principles are then used to apply the penalty.

- *Using the questions in 1(a) to 1(e) in conjunction with the guidance in the table following, determine the appropriate "starting" penalty band and mid- point.*
- *Using the questions in 2(a) to 2(f), decide if mid point is appropriate or if the penalty should be increased or decreased. A change to a higher or lower band should only be done in exceptional circumstances.*

- *Any penalty must exceed any likely gain.*
- *A discretionary penalty would not normally make a boat's score worse than retirement or disqualification.*
- *Percentage penalties are calculated and then rounded to the point (.5 to be rounded upward).*
- *When a breach affects more than one race in a day but it is appropriate to penalise in one race only, the penalty should be applied to either the first race of the day or to the race nearest the incident.*

2012 Paralympic Games Sailing Competition

The following penalties are suggested as guidance as the starting point for assessing any penalty before considering questions 2(a)-2(f).

SI 3	*CODE OF CONDUCT*	
	Failure to comply with a reasonable request by an official	*2*
SI 27	*Boat not in assigned place*	*0*
	Boat launched or removed from water not in accordance with schedule	*2*
	Making modification or repairs without required permission	*3*

10. ANALYSIS

10.1 The Sole Arbitrator recognises, that in respect of statements made several months after the events in question, recollections may not be perfect and in the case of Mr Hinkel, his unfortunate illness disabled him from giving evidence at all other than by his written witness statement upon which he could not be cross-examined. The Sole Arbitrator has taken account of those factors in his assessment of the disputed issues of fact.

10.2 Furthermore in relation to the matters which provoked this appeal both Appellants and First Respondent made mistakes, a reluctance to admit to which had a tendency to affect witness testimony.

10.3 On the one hand Mr Hinkel should have, as SI 27 requires, given his authorisation to haul the heel and his associated conditions in writing to avoid uncertainty. Mr Healy should not for his part have gilded Mr Hinkel's document. The Official Communication of the Protests should have been a more lucid and accurate summary of the IJ's findings and conclusions. The evidence of Mr Healey and Dr Beal was, accordingly not perfectly aligned with the contemporary documentation and the Sole Arbitrator had to be cautious about accepting their testimony at face value.

10.4 On the other hand, Mr Hiscocks should have obeyed Mr Hinkel's instructions, promptly whatever he may have thought about their reasonableness. Mr Park should have taken the opportunity of the first hearing ie of Protest No.21 to deploy the team's full case both as to construction of the rules which underpinned the charges, and with all available evidence, notably that of Mr Hiscocks himself; by not doing so he effectively allowed the IJ no choice but to accept Mr Hinkel's version of events. Admittedly with the benefit of hindsight, absent Mr Hiscocks' decision to continue wiping the keel, notwithstanding Mr Hinkel's instructions

to desist, and Mr Park's decision (the product of team deliberations) there might not have been a Protest at all, and, even if a Protest had been made, no Penalty such as would have cost the British team the bronze medal. But the Sole Arbitrator's clear impression, having seen and heard both these men, was that their sense of responsibility for that unhappy consequence inevitably compelled them, if only subconsciously, to seek to justify their decisions, and the Sole Arbitrator had also to be cautious about accepting their testimony at face value.

10.5 In consequence of these several factors, where possible, the Sole Arbitrator had to rely upon contemporary documentation, (where uncontroversial), inherent probabilities, acceptance by witnesses on one side of evidence given by the other and – inevitably – his own view of the witnesses who did give oral evidence before him in order to tease out, as best he could, precisely what happened, and, no less important, why so as to determine what, if anything, fell within CAS's (and for this purpose his) jurisdiction.

10.6 It can fairly and forcefully be – and was – said by Mr McParland QC on BPA's behalf that the various statements made by Mr Hinkel in the document, in the summary of his evidence before the Protest Committee, in his subsequent e-mail to, *inter alios*, the IJ dated 7 September 2012 and in his witness statement were not entirely consistent. It is probable that the statement he made closest to the event in question was most likely to be accurate (on the assumption that he was not deliberately distorting the truth). That evidence was contained in the document, which was accepted as accurate, at any rate as to primary fact, by Mr Hiscocks in cross examination.

10.7 The Sole Arbitrator therefore finds that the conditions attached to the permission to haul the keel were that Mr Hiscocks should carry out the necessary repairs indicated to Mr Hinkel only, and should otherwise not touch the rest of the bottom of the boat or the keel. Mr Hiscocks, himself, agreed in cross-examination that he wiped other parts of the keel than those that had been repaired (as did Mr Park in his apologia given to the IJ for the purposes of Protest No.21) which necessarily involved admission of a breach of the conditions upon which the keel was hauled.

10.8 Whether or not wiping the keel gave the boat actual competitive advantage was a matter of controversy. It was clear on the balance of the evidence given by Mr Fox, Mr Slaatto, coach to the Norwegian boat, Mr Healy and Dr Beal that wiping a keel in the air is superior to wiping it under water if only because of the visual benefits. Resolution of this issue is, however, unnecessary, since Dr Beal accepted that the Penalty was imposed on the premise that no such competitive advantage was enjoyed by the Boat – that being the declared view of Mr Hinkel – even if unspecified members of the protest committee, other than herself, were not persuaded of that view.

10.9 The Sole Arbitrator has no doubt that when Mr Hinkel later instructed Mr Hiscocks *"Don't do it"* – a phrase he used three times – he was informing Mr Hiscocks that the latter was doing that which Mr Hiscocks was not supposed to do according to the permission granted, that is to say wiping parts of the keel other than subject of the authorised repairs. The words in their natural and ordinary meaning do not suggest that the person to whom they are addressed is doing something that he is authorised to do but in the wrong way (Mr Hiscocks' proffered interpretation) but rather than he is doing something that he is not authorised to do at all. Moreover, on the third occasion when precisely the same phrase was used, Mr Hiscocks

admitted that, then, if not earlier, he did understand perfectly that he was meant to desist: (his reaction to it is discussed below in paragraph 10.11).

10.10 The request was clearly reasonable as the premise for making it was that Mr Hiscocks was indeed doing something outside the authorised permission – it is anyhow hard to see what other proper reason there could have been for making it.

10.11 The Sole Arbitrator finds also that Mr Hinkel did indeed say to Mr Hiscocks that if he did not stop, he (Mr Hinkel) would have to report him and that Mr Hiscocks said words to the effect that he was doing his job and that Mr Hinkel could make a report, if he wished. Such a statement did not feature in the document; but it is not inconsistent with it. Moreover, Mr Hinkel did specifically so state in his evidence to the IJ in Protest No.21 the next day and in his email of 7 September - so it cannot be stigmatized as a recent invention. .

10.12 The Sole Arbitrator recognises that Mr Hiscocks claims to have acceded to the third request, whereas Mr Hinkel claims that Mr Hiscocks carried on wiping. Given that the IJ had the benefit of Mr Hinkel's unchallenged and uncontradicted evidence only, on no conceivable construction of the provisions defining CAS's jurisdiction, could the Sole Arbitrator hold that the IJ's conclusion on this issue of fact was, ultra vires, or capable of being reviewed, still less overturned, by him. In any event Mr Park, who spoke to Mr Hiscocks after the first hearing quotes him as saying that he did *"not recall"* using those words, which falls short of an outright denial, (although in his own witness statement Mr Hiscocks said more emphatically but still not dispositively *"I certainly do not remember him saying that he would file a report against me"*).

10.13 Mr Hiscocks was not impressive as a witness, and, making all due allowances for his unfamiliarity with the arbitral process, the Sole Arbitrator is not persuaded that his somewhat truculent testimony corresponded with what actually took place, and is of the view that Mr Hiscocks consciously disobeyed a clear instruction because he could not see the harm in what he was doing – an action which he now for good and sufficient reason regrets and whose its ultimate consequences - to be fair to him - he could not have anticipated. In the email dated 7 September 2012 Mr Hinkel referred to a later encounter with Mr Hiscocks in which the latter threatened to sue him (which Mr Hiscocks accepted was correct) and appeared to confront him physically (which Mr Hiscocks denied but the Sole Arbitrator find to be not inconsistent with the view he formed of Mr Hiscocks character). There was in short a triple request three times rebutted.

10.14 While there is evidence before the Sole Arbitrator that there had been in the past episodes of friction between the British team and Mr Hinkel, there was no sufficient evidence for him to conclude that Mr Hinkel, in giving the instructions to Mr Hiscocks, was animated by any ill-will towards the British team, nor that in reporting the incident that he was similarly so motivated. Had he been so motivated it would have been easy for him to say so to an apparently not unreceptive audience, the IJ, that in his view the unauthorised wiping did or might have given the British boat a competitive advantage; but significantly he did not.

10.15 Turning to an issue of procedure, the Sole Arbitrator does not consider that Mr Hinkel was obliged to make a protest to the Race Committee – so (as would then have been the case) enabling the Race Committee to act as a filter before any matter went before the IJ rather than to make a report to the IJ direct. Mr Hinkel's document in which he described the incident did not purport to be a protest; indeed it did not satisfy the requirements for the content of a

protest by identifying the rule Mr Hinkel believed to have been broken see RRS 61.2(c). Furthermore the EIC's powers to protest are defined by RRS 60.4 and identify the recipient of such request to be the Race Committee (not the IJ).

10.16 The capacity of Mr Hinkel qua EIC to make a protest was limited to breaches of the race rules class rules and equipment inspection regulations and not of the SI. (see RRS 60(a)). Albeit there was no express provision empowering him to make a report, RRS 60.2 and 60.3 clearly envisaged that such a report could be made, inter alios, by him. There is, accordingly, contrary to the BPA's submissions, no basis for construing the document as a protest.

10.17 Mr Doerr, an expert international judge, understood the novel facility of an EIC protest to the Race Committee direct to be a consequence of the increased numbers for the EIC, the anticipated strength of its members, and the more complex EIRs which govern Olympic and Paralympic sailing competitions, which would, however, thereafter deny the EIC any right to report any breach of a rule direct to the IJ other than in circumstances inapplicable to the Appeal. Mr Fox, the ISAF's Head of Competitions understood the facility, for whose introduction he, inter alios, was responsible, to be designed to relieve the Race Committee of the obligation to protest upon receipt of a report and to allow the EIC to take control over the enforcement of equipment rules and regulations but not to remove its previously existing power to make a report. There is no need to resolve the debate between these two experienced witnesses. In the Sole Arbitrator's view, on a proper construction of the rules, sensibly read,a protest by Mr Hinkel would in the circumstances have been inappropriate, and a report was permissible.

10.18 The Sole Arbitrator next finds that once Mr Hinkel had made a report to the IJ (Protest Committee), was for the IJ to decide what to do with it, unless – which he does not find – the report was on its face deformed by ill-will. It is implicit in RRS 60.3 that a protest committee (ie IJ) may protest a boat in consequence of a report as long as not from an interested party other than the representative of the boat herself. The EIC was not such an interested party. Therefore the IJ could act on his report.

10.19 It is a matter for regret that – as Mr Cook for the First Respondent wisely conceded – that Mr Healy's reformulation of Mr Hinkel's report into a protest to the IJ was couched in language which exaggerated its significance since on no fair reading of Mr Hinkel's report was Mr Hiscocks said to be carrying out additional repair work. This breach of permission was constituted by wiping, which the Sole Arbitrator, for his part would, however, readily equate with cleaning. But the Sole Arbitrator does not find that Mr Healy was animated by any ill-will towards the British team at that stage – or indeed later- for reasons the Sole Arbitrator will explain. The language of the protest was inappropriate; the making of the protest itself was not.

10.20 The two charges which were levelled against the British team were breach of SI 3.1 and breach of SI 27. Though the charges both arose out of the same sequence of event, they related to different matters. It fell therefore to the IJ to find that either or both were (or were not made out) on the evidence before them (which consisted, because of the British team's forensic choice that, of Mr Hinkel only). The Sole Arbitrator will consider these in sequence.

10.21 By way of prelude the Sole Arbitrator notes that it was a peculiar feature of the Appeal that both Appellant and Respondents relied on expert evidence to construe the various legal

instruments in play. While the Sole Arbitrator acknowledges that such evidence may be admissible and useful to explain technical terms of which an adjudicator may be unfamiliar, and to illuminate the policy which underlay relevant provisions of such instruments, he has to remind himself that experts cannot trespass on territory which is for him (or in other cases for a Panel) i.e. the interpretation of documents with legal force.

10.22 The Sole Arbitrator can understand why members of the IJ might in good faith have considered that SI 3.1 was engaged. The Bosun was, in carrying out the repairs, acting on the team's behalf under SI 27. This accurate perception fed into their interpretation of SI 3.1 for the purposes of which they inaccurately perceived the Bosun still to be acting on the teams' behalf.

10.23 It is clear to the Sole Arbitrator that SI 3.1 had nothing to do with the actions of the Bosun in not initially complying with Mr Hinkel's request.

(i) Mr Hiscocks was not in any normal meaning of the word an athlete (in the context of the Event).

(ii) SI.1.4 made the words "athlete" and "competitor" synonymous for the purposes of the SI; and Mr Hiscock was not a competitor either.

(iii) Mr Hiscocks was a "support person"- a distinct category recognized as such both under the RSS and further explained in the ISAF International Judges Manual.

(iv) There are plural rules within the RRS which are specific to athletes and could not *ratione materiae* apply to support personnel see eg SI 2 (safety regulations) 2.1, 2.3 etc). There are other rules related to the competition which apply only to support personnel. see eg the Coach Boat Regulations (CBR) and (ISAF) Race Officials Manual Common Section (in particular part 2 devoted entirely to such personnel) and yet others which apply to athletes but impose upon them non delegable duties see eg RRS 78.1. EIR 1.4 (responsibility for maintain boats in class).As to the latter the contrast with the object and subject matter of SI 3.1 is conspicuous.

(v) No member of the British team was either the object of the request made by Mr Hinkel, nor in necessary consequence failed or refused to comply with it; for none were in a position either to comply or not because the request was not made to them. The policy underpinning SI 3.1.is obvious. No competition could be take place fairly or indeed at all if competitors were free without fear of penalty, to disobey reasonable instructions from a competition official. The same policy is inapplicable, at any rate in the same way, to support personnel.

10.24 The interpretation espoused by the IJ (and, the "experts" called on their behalf) Mr Capron and Ms Middelthon was simply at odds with the unequivocal language of the SI 3.1 provision; a *fortiori* if the *contra profentem* rule of construction, appropriate to penal disciplinary provisions, is deployed. Error, even egregious, of interpretation of rules and regulations is, however, in itself no indication of bad faith; and the fact that Mr Capron and Ms Middelthon, against whom no charge of bias could be laid, made the same error as the IJ confirms the Sole Arbitrator in his view that theIJ was no more than an interpretative mistake.

10.25 The Sole Arbitrator was concerned that the manifestly erroneous construction did – as forcibly contended by Mr McParland QC for BPA – contaminate the determination of Protest 21 and the ultimate Penalty, in particular because the charges related to different aspects of a sequence of linked events. In point of time the alleged breach of SI 27 allegedly constituted by Mr Hiscocks exceeding the conditions attached to the repair permission granted by Mr Hinkel preceded the alleged breach of SI 3.1, allegedly constituted by Mr Hiscocks not complying with Mr Hinkel's request to cease wiping. The former could have been established without any subsequent breach of SI 3, 1 (even if, contrary to the Sole Arbitrator's clear view) SI 3.1 was applicable at all. Nonetheless the IJ might plausibly have reasoned that Mr Hiscocks non-compliance with Mr Hinkel's request to desist from wiping unaffected areas of the keel aggravated the breach constituted by the wiping itself.

10.26 Again, for reasons the Sole Arbitrator shall explain, he does not find that to have been the position. The evidence of Dr Beal – who was the only member of the IJ seized of Protest 21 to give oral evidence before him – was that while both SI 3.1 and SI 27 were considered, by the IJ in the end, paradoxically, it used Section SI 3.1 as a basis for diminishing what would otherwise have been the penalty appropriate to SI 27 rather than enhancing it, or, indeed, treating the two cumulatively.

10.27 The Sole Arbitrator's assessment of Dr Beal (a clinical psychologist by profession), was that she was an honest witness who may have lost her way somewhat in the labyrinth of rules, but was ultimately seeking to reach what she and other members of the Committee considered, using the available guidance, to be a reasonable result. The Sole Arbitrator accepts too that Dr Beal had not known of the then positions of the boats before or at the hearing of Protest 21.

10.28 SI.27 itself presents no difficulties of construction at all. The duty imposed was non-delegable. A breach of SI.27 would be involved whoever on behalf of the British team gave instructions to haul the keel or hauled the keel, when there was no permission to do so: likewise if the conditions attached to it were not respected. That was the salient difference between it and SI 3.1 which imposed a personal duty only. Nor is the policy which underpinned SI.27 other than clear. Absent such a rule (or one similar) there would be a palpable risk of teams hauling the keel to effect improvements to a boat to the detriment of fair competition.

10.29 The main issue the Sole Arbitrator had in this context to decide was whether the admitted absence of express reference to SI.27 in the conclusions in Protest number 21, was a matter of form rather than substance. He has concluded that it was indeed a matter of form-of imperfect recording - and while he appreciates why BPA genuinely consider otherwise, the evidence considered fairly and in the round supports his conclusion for the following reasons:

(i) There is no doubt at all that the charge was, and was known to Mr Park and the British Team, to be a charge brought by reference to both rules as the documents initiating the process unambiguously indicate.

(ii) There was an intersection between the two charges inasmuch as the charge (wrongly brought) under SI 3.1 was of breach of an instruction not to do something unauthorised by the permission given under SI 27. SI 3.1 could on the facts not sensibly be considered without reference to SI 27.

(iii) The facts that were found were in substantial measure referable to SI 27 as well as to SI 3.1; indeed some uniquely so e.g in Protest 21. *"Once the bosun completed the repairs he began to wipe the whole keel including the port side"*.

(iv) Most significantly that was the way in which the British Team had indeed interpreted not only the charges but the initial findings made. Both the application for redress and two of the three applications for re-opening focus, inter alia, on SI 27. The point being made by the British team was that a finding of breach of SI 27 could not be sustained since **written** permission was required under it to haul the keel, and that since no written permission was given, any conditions attached to oral permission were, to use a not inapt metaphor, writ in water. The difficulty with that ingenious submission is, of course, that, pressed to its logical conclusion, it would mean that there was a clear violation of SI 27 of the British team in hauling the keel without any authorisation at all. But, that apart, the Sole Arbitrator concludes there could be no reason for addressing SI 27 at all unless the British Team considered that it was not just part of the charge made, but also part of the case found, against them. For the same reason, there was no unfairness resulting from any shortfall in the drafting of the records of the several protest decisions.

10.30 BPA contended that the IJ Committee was itself biased – indeed it could only be the IJ bias that could be relevant since it was only the IJ that was the decision maker in respect of the decision under challenge. The establishment of bias against an experienced IJ, specially selected for the special purpose of adjudication at the Paralympics, requires cogent evidence. That evidence is, in the judgment of the Sole Arbitrator, lacking. Mr Healy was – as Mr Park acknowledged – particularly expert in the area of the Rules themselves and the adjudicative process. But it was he who excused himself from the original decision on the basis that the American crew were vying for places with the British crew and it was he who considered that the justice would not be done if he participated in that decision, [although he returned to the Committee for the later protests at which stage the outcome could not benefit the American crew]. Furthermore, in respect of the second of the two amalgamated protests it was Mr Healy who insisted that both Miss Suggitt and Mr Hiscocks gave evidence in full even though at that stage the issue was whether the matter should be re-opened to entertain that evidence at all. The Sole Arbitrator cannot accept Mr Park's perception, genuine though it no doubt was, that such insistence showed hostility towards the British team rather than care taken to see if the test of newly available evidence was satisfied.

10.31 As for Dr Beal, the Sole Arbitrator has already noted that, despite her personal views, she proceeded on the basis that no competitive advantage had been gained by Mr Hiscocks wiping of areas of the keel without the permission granted, and moreover did not apply discretionary penalty that she thought appropriate to SI 27, given that SI 3.1 suggested a lesser one. As to Mr Sleutel – recently knighted in one of her last royal acts by the former Queen of the Netherlands – the most that could be said was that he appeared intemperate during the hearings, which may be explained by the fact that he had been the victim of a stroke, which the BPA generously accepted could explain his demeanour. Not every judge, arbitrator or member of a sports disciplinary panel, is always temperate; indeed a few never are. *Non sequitur* that such an adjudicator is biased or, absent the use of inflammatory language, could reasonably be thought to be so.

10.32 One of the difficulties in BPA's path of making the charge of bias stick against the IJ - and the charge was only made in respect of the three named member and not the others - is that the allegations were not consistent, varying from the allegation that the IJ were somehow infected by Mr Hinkel's bias, to the allegation that they themselves were biased against the British team from the outset, to the allegation that after deciding Protest 21, they appreciated their initial error, and thereafter were simply seeking to cover up the mistake they now recognized they had made in their initial finding that S3.1 had been breached.

10.33 The Sole Arbitrator does not accept that there was any pre-disposition to penalise the British Team because they were British or for any other reason related to past matters preceding the incident, nor that the refusal of redress or re-opening was designed to cover up a mistake that they were conscious of having made. On the contrary the IJ continued at the material time (and, it appears, continue to this day) not to accept that their construction of SI 3.1 was mistaken. In the Sole Arbitrator's view the absence of express reference in the findings in Protest No. 21 to SI 27 was nothing other than an explicable error of recording in the peculiar circumstances in which decisions on Protests had to be made and announced rapidly. Indeed, absent a breach of SI 27, Mr Hinkel's request to Mr Hiscocks to desist from wiping would not have been reasonable or even understandable …. The Sole Arbitrator repeats; a breach of SI.27 could have occurred without the alleged breach of S 3.1 but not vice versa.

10.34 Another argument ventilated by BPA was that Mr Healy should not have sat on any of the protests, and not merely not on the first. It may seem peculiar to persons sensitive to a growing consciousness in many jurisdictions, common law and civilian, as well as in international arbitration, that the appearance of justice is as important as its actuality, that someone such as Mr Healy who had formulated the Protest or charge for the IJ should thereafter participate at **any** stage in its deliberations; doubling up the roles of prosecutor and judge.

10.35 However, the rules actually encourage participation of members of the Protest Committee who had witnessed incidents which had formed the subject of a protest. It is expressly stated in RRS 63.6 that a member of the Protest Committee who saw the incident may give evidence and so have a dual role as witness and judge; (see too the discussion in ISAF Judges Manual Section K 26 validating the practice). It does not, accordingly, seem anomalous in such a special context, whatever might be the general law as to the requirements of independence and impartiality, that the same member may have such role. The Sole Arbitrator does not consider that he should stigmatise as unlawful a hallowed practice which becomes, in effect, a necessity given the limited number of appropriate international jurors at the Paralympics, i.e. seven, with a quorum of five. In any event first the participants in the Paralympics must be taken by their participation to have known that this is and was the system, and must be taken to have agreed to it; secondly Mr Healy did not involve himself in imposition of the penalty; thirdly Mr Park made no objection to Mr Healy's presence at the hearing of Protest No. 26, 27 or 28.

10.36 Nor finally does the Sole Arbitrator consider that bias can simply be inferred from the size of the penalty. He readily accepts that there is unchallenged evidence that this was by far the most significant penalty imposed at the Paralympics sailing but Dr Beal's best recollection of the thinking process of the Committee (which he does not consider to be *ex po facto* rationalisation) shows, again, that the Committee genuinely thought that, using the discretionary penalty guidelines (whose correct interpretation is by no means clear), that the

IJ had conscientiously reached a consistent result. She said in her written statement-to the substance of which she adhered under forceful cross-examination-

> *"Based on the facts found, we used the information for Athletes and Race Officials Regarding Discretionary Penalties. A breach of SI 3, failure to comply with a reasonable request by an official, guided us to use Band 2 as a starting point for the penalty. A breach of SI 27.1 by exceeding the terms of the repair work given the Equipment Inspector guided us to use Band 3 as a starting point for the penalty.*
>
> *Working through questions 1(a) to 1(e) we found that 1(b) applied. Mr Hinkel's opinion was that there was no performance advantage to GBR by cleaning the side of the keel that was not permitted. The IJ had mixed opinions on whether there could be a performance advantage; some believing that the extra cleaning would provide an advantage, while others preferred to use the opinion of the Equipment Inspector.*
>
> *Working through questions 2(a) to 2(f) we found circumstances that applied. The bosun had failed to comply with the three requests to stop work. He had heard the threat of having a report filed, but his response indicated indifference. He had continued until he had completed working. This evidence was not contested in the hearing. The IJ therefore concluded that the breach of going beyond the terms of that permission and failing to comply with a reasonable request from a race official was deliberate. Question 2(a) then advised us to increase the band at least one level – and to consider RR2. In considering this advice, we decided that we would not take the penalty beyond Band 3, which was one level above the band for the breach of SI 3.1, and within the band for the breach of SI 27.1. We also decided that we would not take action under RRS 2. That put the penalty at the mid-point of Band 3.*
>
> *We then reconsidered mitigating circumstances. We noted that Team GBR had not disputed any aspect of Mr Hinkel's report, they had acknowledged that the bosun had made an error of judgment. On those grounds, and with Mr Hinkel's opinion that there was no performance advantage, that IJ reduced the penalty to the bottom of Band 3, which was 30%. We noticed that this penalty was equal to a penalty at the top of Band 2 (30% in both cases).*
>
> *The list of competitors in each event that was in the hearing room showed that there was 14 boats in the Sonar event. The calculation then, was that the penalty would be (30% of 14) 4.2 points, rounded down to 4 points. The penalty would be applied to race 7, the race closest in time to the incident using RRS 64.1(d)".*

10.37 Mr Fox agreed that the penalty was *"high"* and Mr Doerr that it was *"harsh"*. Mr Hinkel himself was surprised by it, at the time and Dr Beal herself – with the benefit of hindsight and full exposure to the British case which had been denied her by the British Team's forensic choice – might have preferred a lesser penalty, none of the witnesses – for what it was worth – stigmatised it as irrational or perverse. Some of the reasoning may have vulnerable to criticism; to take one example, Band 3 for breach of SI27 may have been too high given that breach of conditions attached to a permission is not actually referred to in the guidelines at all,, although BPA's argument that the starting point should therefore have been zero savoured of unreality. But guidelines are only guidelines and the Sole Arbitrator finds that there was certainly no intent to deny the British Team a medal; indeed at the time the initial decision in Protest 21 was taken, there was still another race in prospect, so that the IJ members, devoid of prophetic gifts, simply could not have anticipated that outcome of the penalty imposed would be loss of

a British medal. And given that the appeal would surely never have been brought but for the fact that the British Team were denied a medal they believed was rightfully theirs rather than merely relegated "lower" down the list of non-medallists the Sole Arbitrator must observe that only if they had been given no penalty point at all (but rather a mere warning) would they have been elevated to bronze medal position. It would indeed, in the Sole Arbitrator's view, have been wrong if the Penalty was otherwise thought appropriate for the breach for the IJ to have lowered it simply because of the adventitious circumstance that it caused the British Team to lose a medal.

10.38 The Sole Arbitrator has nonetheless sympathy with the position of the British Team as it seems did the French Team (*"Team France really sorry for Team GBR"*). Firstly it is always a matter for regret when the award of an Olympic medal, the acme of an athlete's ambition (cf CAS 2002/O/273 para 23), is determined not in competition in or on the arena but in consequence of an adjudicative disciplinary process, where the rule violation had no effect on the outcome of the sporting competition. Secondly the manifold blemishes in the record of the Protests coupled with the severity of the penalty by themselves were calculated to excite the suspicions of substantive and procedural impropriety that the British team genuinely entertained - even if, with the benefit of full examination, the Sole Arbitrator has found that those suspicions were not proven to be correct. Thirdly, for reasons he has already deployed, if different steps had been taken at different times by or on behalf of the team, a different outcome might have ensued. As the First Respondent said in its Answer *"one may wonder whether the outcome might have been different had the Appellant taken a different path"*. Any such speculation, however, falls outside the Sole Arbitrators' proper function.

10.39 Nonetheless given his findings on the facts, the Sole Arbitrator concludes that the IJ's decisions, whether in the view of others right or indeed wrong, were related to technical rules as constituted in the IPC Handbook. There was muddle but no malice.

10.40 The Sole Arbitrator therefore declines jurisdiction with the consequence that the Decisions must stand.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Court of Arbitration lacks jurisdiction to entertain the appeal filed by the British Paralympic Association against the decisions of the International Association for Disabled Sailing of 5th and 6th September 2012.

2. The decisions of the International Association for Disabled Sailing of 5th and 6th September 2012 stand.

3. (…).

4. (…).

5. All other requests for relief are dismissed.