



# CASE 38 – Decision

1. On Saturday 9th September 2006 a race in the Honda Formula 4-Stroke Powerboat offshore series was to be held at Liverpool. A few minutes after midnight on Friday a man in a white teeshirt walked onto the pontoon in the Albert Dock, where the boats entered for the event were berthed. He turned on a water tap, picked up a hose, boarded Boat A number 22, and proceeded to fill the fuel tank with water. This operation took about 3 minutes. He then turned off the tap and coiled the hose. He managed to evade the security guards. On his way out he used his mobile telephone. Unknown to him he was caught on CCTV.
1. When the race started at 1315 on the Saturday afternoon Boat A had failed to reach the start line. Its engine had cut out after a few minutes when it moved from the dock. It had been effectively sabotaged.
2. The man on the pontoon was Member E, the holder of an offshore powerboat racing licence from the RYA, and the driver of the boat entered in the race by Racing Team B. He has confessed. The main issue which I have to decide is whether his fellow team member, Member F, the owner and navigator of Boat B, was complicit in this act of gross misconduct.

#### The Disciplinary Proceedings

3. Member E and Member F ("the applicants") both hold annual offshore powerboat racing licences issued by the RYA under chapter C of the RYA offshore racing handbook.
4. On Saturday afternoon the fuel tank of Boat A was drained and about 70 litres of water was found. The CCTV footage was examined and it was observed that at about 4.15pm on Friday Boat B had moored alongside Boat A, when a hose had been used for cleaning. When the later CCTV footage was examined Member E was identified as the midnight visitor to the pontoon.
5. On Sunday morning 10 September the members of Racing Team B were summoned to a meeting with officials at about 9am. They were informed of the findings and that the team had been disqualified from the event. They were told that the matter would be dealt with by a Disciplinary Board of the RYA. Member E confessed and apologised for his actions. Member F said nothing save to ask whether he would have an opportunity to put forward a case at the disciplinary hearing. He was told by Mr. Power this was a matter for the RYA.
6. The Disciplinary Board appointed by the RYA held a hearing on 20 October 2006. The Disciplinary Board purported to find Racing Team B guilty of gross misconduct under rule F26 and unsportsmanlike behaviour under rule F32(j). The finding was based on the assumption that Member F as a member of the team was responsible for

the conduct of Member E. Their current licences were withdrawn and they were disqualified from holding a licence before 1 January 2012.

7. The conduct of the Disciplinary Board hearing was not beyond criticism. On an appeal by Member E and Member F under Chapter P of the RYA rules, the Appeal Board concluded that there were several flaws in procedure and the rules of natural justice had not been complied with. The board considered that it did not have jurisdiction to entertain the appeal, as its powers under rule P4 A were confined to considering "a question of the interpretation of the rules" only. It therefore recommended that there should be a rehearing before a newly constituted disciplinary board as soon as possible. It was noted that there was no power to impose a disciplinary sanction on a team, as opposed to the individuals composing that team.
8. By letter dated 11 January 2007 the RYA notified the applicants of the decision of the Appeal Board and proposed that instead of a rehearing the matter should be referred to the Sports Dispute Resolution Panel. The parties subsequently agreed, in an arbitration agreement made on about 24 May 2007, that this matter should be referred to arbitration under the rules of the Sports Dispute Resolution Panel and I was appointed as the arbitrator.

#### The Arbitrator's Jurisdiction

9. A point has been raised in this arbitration as to whether I have any jurisdiction to conduct a rehearing of the case against Member E and Member F.
10. The essence of the preliminary point is as follows. It is argued that the proceedings of the Disciplinary Board were in breach of the rules of natural justice and therefore void in law, the effect of the ruling by the Appeal Board was to set aside the decision of the Disciplinary Board, and the RYA has no power to reconvene a Disciplinary Board because the time for so doing under the rules has expired.
11. It is not necessary for me to express a view as to whether the Disciplinary Board proceedings failed to comply with the rules of natural justice, although I am inclined to agree with the view of the Appeal Board that there were serious procedural failings. It is highly undesirable that any witness should give evidence to a Disciplinary Board in the absence of the party affected. However I take the view that the ruling of the Appeal Board, as set out in the document attached to the letter dated 11 January 2007, did not purport to allow the appeal. It ruled that it had no jurisdiction as this was not an appeal "on a question of the interpretation of the rules". It made a recommendation that there should be a rehearing, but did not purport to set aside the decision of the Disciplinary Board, still less to uphold the appeal. The Appeal Board had no power under the rules to order a rehearing, but the recommendation

was clearly sensible.

12. In any event I do not consider that there is any provision of the rules which prevents a rehearing being held. Rule P3 C is the only relevant rule which imposes a timetable on the disciplinary process, which should start within 7 days of a submission from the Powerboat Racing Manager. In my view the time periods stated are directory and do not make time of the essence. There is nothing in the language of the rule to suggest that the draftsman of the rules intended to make it impossible to commence disciplinary proceedings if for any reason there was a failure to pursue the process within those stipulated time limits. If, for example, some material evidence had surfaced at a later time it would be strange if the RYA was unable to act on that evidence by commencing, or recommencing, the disciplinary process.
13. Accordingly my analysis of my jurisdiction is as follows. The parties have agreed under the arbitration agreement that I have jurisdiction over all disputes. The RYA has conceded that there should be a rehearing. The applicants do not contend that the decision of the Disciplinary Board should stand, but have failed to persuade me that the rules preclude the holding of disciplinary process at this time. In the alternative they too contend for a full rehearing. On that basis the function which I have to perform, in place of or by way of appeal from the Disciplinary Board, is to conduct a full rehearing of the charge of misconduct alleged by the RYA, with power to impose any sanction permitted by the rules which would have been open to the Disciplinary Board.

### The legal framework

14. The relevant rules of the RYA are set out in the Offshore Racing Handbook. There is no dispute that each of the applicants, as the holder of an annual racing licence issued under chapter C, was subject to the rules of the RYA.
15. Under rule F1 a competitor needs to produce a valid licence to race. The boat must also be registered under chapter B. There does not appear to be a requirement to register a team.
16. Rule F26 is the relevant rule which deals with gross misconduct. It states:

“After a finding of gross infringement of the RYA rules or a gross breach of good manners or sportsmanship, the race committee or Disciplinary Board may exclude such a competitor, and a boat when appropriate, from a race or meeting. The club may report this to the RYA for further action. Upon receipt of such a report, the RYA shall conduct an investigation and, when appropriate, a hearing and take such action as it deems appropriate against the person or persons or the boat involved. Such action may include disqualification from participating in any race held

in its jurisdiction for any period, or other disciplinary action.”

17. Rule F32 provides for penalties. For “unsportsmanlike behaviour or antisocial behaviour by licence holder or official” it provides “Warning and referral to RYA Disciplinary Board/ Fine/Disqualification”. Rule P3 also provides for penalties but does not include an express power to impose a fine.
18. These rules are not entirely clear or consistent. A distinction needs to be drawn between disqualification from an event, and the imposition of a penalty by the removal of a licence or by a fine. I consider that the race committee did have power to disqualify the boat from the relevant race on the grounds of misconduct by one of the competitors constituting the team managing the boat at that event. However I do not consider that the Disciplinary Board had power to penalise one competitor for misconduct by another, on the basis of team responsibility. It may be that reference in rule F26 to disciplinary action against “the boat” led them to think that they had such power.
19. For the purposes of this arbitration I did not understand there to be any challenge to the validity of the decision to disqualify the competitors, and the boat, from the event held on 9 September 2006. The RYA does not seek the imposition of a fine. There is no dispute that the rules give the RYA power to disqualify “for any period”, which could include a lifetime ban.
20. The burden lies on the RYA to establish the gross misconduct alleged against each of the licence holders. The misconduct alleged is gross misconduct under rule F26 by a gross breach of sportsmanship in sabotaging a competing boat.
21. The standard of proof to be applied is the accepted civil standard of the balance of probability. However an allegation of sabotage by placing water in the fuel tank of a competing boat is of the most serious nature and the sanctions which the licence holders face include the possibility of being excluded from the sport for life. There must therefore be cogent evidence to prove this misconduct (see the judgment of Lord Nicholls in *Re H* [1996] 1 AllER 1 at p. 17 ). I must be clearly convinced of the truth of the allegation before I can find it proved.

#### The background

22. In September 2005 there was a collision in Guernsey between Boat A and Boat B. Racing Team B had been in contention for the 2005 championship, which it lost as a result of the collision which Member E and Member F blamed on their competitors. At a protest hearing it was decided that the collision was the fault of the navigator Member F. From then on there was a grudge borne by Racing Team B against Racing Team A .

23. On the evening of Thursday 7 September 2006 Andrew Pugh, the managing director of the Racing Team C, met Member F in the Holiday Inn. In the course of a conversation Mr. Pugh understood Member F to be saying that Racing Team B had only come to Liverpool to stop Racing Team A, which were then in contention to finish in the top 3, from doing well in the championship. I have no doubt that Mr. Pugh genuinely formed that impression, but I am unable to hold that the effect of the conversation was a clear intimation of an intention to stop Boat A by fair means or foul. What I did find convincing was Mr. Pugh's impression of the passion with which Member F manifested an hostility to Racing Team A arising from the Guernsey incident. Member F himself accepts that he "wanted to ensure that Racing Team A did not finish well".
24. From that evidence, and other evidence to which I refer below, I have no doubt that that both members of Racing Team B held a continuing grudge against Racing Team A and shared a desire to get even with them for the incident in Guernsey.

#### The chronology

25. The documentary evidence of the chronology of the events which happened on that weekend in Liverpool consists of the CCTV footage and the mobile telephone records of Member E and Member F.
26. At about 4.15 p.m. on Friday Racing Team B berthed their boat alongside Boat A. They used the water hose to clean off their own boat for about two minutes. They were in broad daylight and many other people were around. If they had attempted to tamper with Boat A they would have run a serious risk of being observed. There is no evidence from the CCTV footage that they did so.
27. Thus I reject the suggestion that at this time Member E or Member F used the hose to put water in the fuel tank of Boat A. On the other hand that cleaning operation did enable both of them to ascertain precisely where the water supply was located and see what would need to be done if they wanted to sabotage the boat at a later time. They appear to have been the last crew to leave the pontoon and the hose was left uncoiled near Boat A.
28. In the evening Member E and Member F went out drinking. They met in a restaurant for supper at some time after 2044 when Member E placed a call to Member F. Member E left the restaurant sometime after 2200. He says he went on drinking.
29. At 2253 Member F sent a text message to Member E. The content of that text message is the subject of dispute. Member E has stated that it asked whether he had yet done anything to Boat A. Member F does not recall the

content or purpose of the message, but states that it may have been a reminder to check the battery on the boat or a warning to stay out of trouble. Neither suggests that there was any specific need, arising from what was said in the restaurant, for a text message to be sent.

30. At 1204 Member E is observed on the CCTV walking along the pontoon. 30 seconds later he turns on the tap and takes the hose onto Boat A. At 1206 two security guards walk along the dock. Immediately after they have passed Member E leaves the boat. At 1207 he turns off the tap, and then coils the hose. He remains on the pontoon between 1209 and 1213, during which time he can be observed using his mobile phone. There are no records of him making calls at this time, so there must have been an incoming call. At 1215 he sends a text message.
31. In the morning there were at least 3 telephone calls between Member E and Member F, commencing with a four minute call made by Member F at 0814.
32. The boats were due to leave the dock well before 1300. Member E was late in arriving, but the boat made it to the start line on time. Before crossing the start line Member F saw that Boat A had failed to make it and told Member E. On their evidence they had no further conversation until later that night about Boat A or its failure to race.
33. At about 11pm Member F met the members of Racing Team A in the hotel. An innocent enquiry as to what had happened elicited a pretty forthright response to the effect, I infer, that Racing Team B knew perfectly well, because they had sabotaged the boat. Member F's evidence is that he then telephoned Member E at 2309 to ask whether he had done it, and received an evasive response ("I know a man who might have") which indicated that indeed he had.
34. At 0838 on Sunday morning Member E placed a short call to Member F. Member E's evidence is that on the way to the meeting with the officials at 9am he informed Member F that he had done the deed. What then happened at the meeting is set out at paragraph 6 above.

#### The conduct of Member E

35. Member E's explanation of why he acted as he did is as follows:

"I went to the boat mooring location late at night ... with the intention of turning off the battery switch on our boat. I did this without talking to ((Member F)); the thought only occurred to me after I had got back to my hotel room ... it

was only when I arrived on the pontoon that I formed the decision to do what I did.”

36. Member F does not seek to explain why Member E should act as he did, but he does assert that Member E was extremely drunk by the time they met at the restaurant (“(he) was so drunk he was unable to read the menu”) so the suggestion is that the act of sabotage was a drunken impulsive act.
37. I reject this version of the facts. Member E’s conduct is only consistent with a premeditated plan to sabotage the boat. He went directly to the water tap to turn on the hose, before reaching the boat. He needed to evade the security guards on entering the pontoon, for about 9 minutes whilst he was in the vicinity of the boats, and when leaving the pontoon. He was plainly not drunk, otherwise he could not have achieved what he set out to do. There is no sign on the CCTV footage of any unsteadiness in his behaviour and he was clearly able to use his mobile phone and read a text message. He may have drunk quite a bit earlier in the evening but the fresh air and the adrenaline generated by carrying out a highly risky task without being spotted by the security guards would have sobered him up.
38. This was not an impulsive act, but the carrying into effect of a plan which must have been thought through before he even arrived on the pontoon. It is inconceivable that only when walking along the pontoon did he conceive the idea of sabotaging the boat. He went straight for the water tap.
39. The question then arises as to Member E’s motive. The only possible motive was to get even with Racing Team A for the collision in Guernsey. Member E does not suggest any other motive. That demonstrates a deeply held sense of grievance against the competing team, to such an extent that he was prepared to sabotage their boat. If he had that desire to get even, then it is improbable that Member F, the owner and senior member of the team, did not share that antipathy towards Racing Team A . There is no particular reason why Member E should have harboured any greater animosity towards Racing Team A than that held by Member F.
40. I did not find Member E’s evidence persuasive. He was uncertain about key points. He did not accept what was said about his statements to the Disciplinary Board but then accepted the record as substantially accurate. His references show that his conduct was completely out of character, so the question arises why he should have been prepared to go as far as he did. I do not consider that he would have acquired the nerve to commit the act without at least the approval of Member F. He is clearly the junior partner to Member F and dependent upon him. As soon as he was confronted with the evidence of his misconduct he confessed. This was not the conduct of a strong character acting on his own initiative.



## The evidence of Member F

41. In contrast I did find the evidence of Member F more forceful and considered. As he said he does not make statements unless he needs to do so. Where his evidence leaves questions unanswered, as it does, that is doubtless a deliberate choice.
42. On Member F's evidence he had no reason to suspect that there had been any foul play before Saturday evening when he spoke to members of Racing Team A at about 11 p.m. and received the clear impression that they believed, quite wrongly, that he had been responsible for the mechanical failure of their boat. Up until that time he had apparently had no discussions at all with Member E – or anyone else - about what had happened to Boat A. At the start of the race he had observed that the boat had not reached the start line, but this observation had not occasioned any response from Member E nor had it been followed up at all during the next 10 hours. At 2309 he had a two minute telephone conversation with Member E during which he says he challenged Member E on whether he had interfered with the boat and received an evasive response, from which he concluded that Member E might have sabotaged the boat.
43. I find that evidence difficult to accept. Even setting aside the background of hostility towards Racing Team A it is most unlikely that there would have been no discussion as to why another boat had failed to make the race. They had been moored next to each other, the teams were keen competitors, they set off at about the same time and they must have each seen the boat when they returned to the dock. The unexplained breakdown of a leading boat must have been the subject of considerable interest to all competitors. Yet not apparently to Member F, even though he held a particular grievance against that team.
44. Against the background of that grievance it is incredible that Member F would not have talked to Member E about why the boat had failed. On Member F's own evidence his purpose in participating in the race was to ensure that Racing Team A did not finish well, and that aim had now been achieved before the race had even started. Yet on his statement he was "completely unaware of the reason for their apparent breakdown" and did not trouble to ask anyone until about 11pm.
45. The second point at which I find his evidence difficult to accept is his drawing of a veil over the events of Saturday morning. What he says at paragraph 16 of his witness statement is this:

"The following day, Saturday 10 September I was unable to locate [Member E's] whereabouts until approximately 30 minutes before the race, which was due to start in the afternoon. [Member E] eventually turned up sporting a cut and swelling to his lower lip following an encounter at a nightclub."

46. I do not accept this evidence which seeks to suggest that he had no contact on Saturday with Member E until immediately before the race when he appeared at the dock the worse for wear. He sent him a text message at 0808, had a 4 minute telephone conversation with him at 0814 and then at least two further telephone conversations during the course of the morning. He thus knew where he was and whether he was ready and fit to race. Neither Member E nor Member F have explained what these conversations were about.
47. The third point of difficulty with Member F's evidence is his reaction to the discovery from Member E that he had sabotaged the boat. On Saturday evening he says he was "absolutely furious" with Member E for what he had done. Yet at the meeting with officials on Sunday morning he did not say anything of substance. I do not accept that he was advised by Mr. Power to say nothing; he was told the matter would be dealt with by the RYA. He explained to me that there was no need to say anything and he thought it was better to reserve his position until he saw the evidence against him. His stance was that he was going to say to the RYA "prove it". That may have been perfectly sensible, but it does not inspire much confidence in the genuineness of his professed state of fury against Member E. He had just discovered that Member E had committed an act which had caused the team to be disqualified from the race and had exposed Member F to the risk of losing his licence. Member F on his case had nothing to hide and much to gain from making clear at the earliest possible opportunity that the sabotage was nothing to do with him. The natural reaction would have been to disown Member E's conduct. Instead he kept quiet and, as the telephone records show, he continued to communicate with Member E on a frequent basis in the following days. He remains supportive of Member E and wishes to race with him in the future. This is not the conduct of a man who is genuinely angry with Member E for what he has done.

The text message sent at 2253

48. When Racing Team B was disqualified on Sunday morning there was no real evidence against Member F. That position only changed when, shortly before the disciplinary hearing, Member E told Mr. Power on the telephone that he had received a text message from Member F at around the time that he did the deed.

49. I do not place any reliance in this respect on the evidence from Mr. Power which I did not find particularly precise or clear. The Disciplinary Board was surprised that Mr. Power did not produce this evidence until half way through the hearing, and I am surprised that he did not make any note of this important piece of evidence.
50. More reliable is what Member E himself accepts that he told the Disciplinary Board. Before he chose to give this evidence he had been given an opportunity to discuss with his legal advisers Mr. Power's statement about the telephone conversation. So Member E's evidence was clearly carefully considered by him, with an appreciation of the implications, before he gave it.
51. The minute of that evidence, which is accepted by Member E, reads as follows:
- "[Member E] stated that he had received a text message from [Member F] on or around the time of the incident. The contents of the message being "Did you or have you done any thing with regards to [Racing Team A]?" It was said in a light way. He did not respond to the text message. Edmund Whelan asked [Member E]: "what did you take this message to mean?" [Member E] said: "There would be a "get back" following the incident regarding Boat A in Guernsey 2005."
52. Later in his evidence Member E states that he was not put up to it by Member F, and that the "get back" was not discussed with him. But the text message does clearly establish that getting even with Racing Team A was a topic of discussion between the pair that weekend.
53. I do not believe that the text message was in the precise terms minuted, but the general sense is clear. In the context it can only be understood as an encouragement to act against Boat A. If it was not relevant to the act of sabotage then Member F would never have disclosed it to Mr. Power. In effect he was coming clean and disclosing why he had acted as he did.
54. Member E's evidence was to the effect that the text message should be seen as a joke. I cannot accept that any text message to that effect sent in those circumstances could reasonably be understood as a joke and Member E's evidence did not explain convincingly how he read it as such.
55. Member F's evidence was that he could not recall the content of the text message, but that it might have been a warning not to get into trouble or a reminder to check the security of the boat. The first appears fairly pointless and the second a surprising request to make by text message sent to a man who was too drunk to read a menu.

Member F is unable to explain away the evidence given by Member E. That evidence is not alleged to have been malicious and cannot result from a misunderstanding.

56. In my view the text message sent by Member F to Member E at 2253 was an encouragement or instruction to proceed in line with a plan that must have been discussed between the two of them to sabotage Boat A.

#### The complicity of Member F

57. In the circumstances set out above I am convinced that Member F was a party to the act of sabotage in inciting Member E to act as he did. The general probabilities suggest that Member E would not have acted alone on his own initiative. The evidence of Member F is in a number of respects unreliable in its attempt to exculpate himself. But critically the evidence given by Member E as to the text message is only consistent with Member F participating in a plan to sabotage the boat. Member E was thus acting in concert with Member F.

#### Penalty

58. The Disciplinary Board decided that each competitor should be disqualified for a period of 5 years.
59. There can be no more serious offence than sabotaging a competitor's boat. The offence strikes at the heart of fair competition. It places the competing team in the way of danger because, unknown to them, their engine may fail at any time.
60. I accept that Member E and Member F did not intend that Racing Team A should be placed in danger, but their actions could have had that effect. It was not possible to predict where and when the engine would cut out.
61. I do not consider that there can be any real mitigation of the seriousness of the conduct of Member E and Member F. Member E only confessed after he discovered that he had been caught on CCTV. Member F denies any involvement. On my findings this was a planned attack on the boat designed to scupper its chances in the race. It was certainly not an impulsive act committed under the influence of drink. It took some planning, some nerve and some encouragement.

62. In my view the proper penalty for such an offence could well have been a 10 year disqualification or even a lifetime ban. I would not have regarded it as at all unfair if these licence holders were prevented from ever participating in the sport again.
63. But for two reasons I have decided that it would not be fair or right to increase the sentence imposed by the Disciplinary Board. Firstly it must primarily be for the expert judgement of those running the sport, not for an outside arbitrator, to decide the proper penalty. The RYA does not invite me to increase the penalty. Secondly these proceedings are in substance an appeal against the decision of the Disciplinary Board. It might be unfair to impose a greater penalty in circumstances where the applicants, having entered into an arbitration agreement, have no ability to withdraw the appeal.
64. I therefore decide that Member E and Member F should each be disqualified from holding an offshore powerboat racing licence before 1 January 2012.

#### Costs

65. Under paragraph 6 of the arbitration agreement I have no power to make any award of legal costs. But I do have power to make an award of the costs of the arbitration which have been borne as to one third by the RYA. In view of the seriousness of the misconduct which I have found proved I was inclined to order that all costs should be borne by Member E and Member F. However the applicants have pointed to the errors which were made by the RYA at the Disciplinary Board and submitted that it would be unfair that they should have to bear the RYA's share of the costs of the arbitration. I think the criticism of the RYA disciplinary process is well-founded and the applicants had a justified view that their case was not dealt with properly. On advice they acted very reasonably in agreeing to this arbitration, instead of entering into litigation which would have been time consuming, costly to all parties and detrimental to the sport. I therefore think it is fair that the RYA should bear its own share of the costs of the arbitration.
66. In this case the parties were able to agree to an arbitration administered by the Sports Dispute Resolution Panel. In other cases where competitors may feel aggrieved by disciplinary decisions the RYA may not be so fortunate. The lack of provision in the RYA rules for an appeal to an independent appeal body, with full power to conduct a rehearing, and the omission of any arbitration clause, exposes the RYA to a serious risk of litigation, including claims for damages.

## AWARD

67. For the reasons set out above I make the following award:

- (1) Member E and Member F were guilty of gross misconduct under Rule F26 of the RYA Offshore Racing Handbook on Saturday 9 September 2006 in sabotaging Boat A number 22 by causing water to be placed in the fuel tank;
- (2) Racing Team B boat was properly disqualified from the offshore event held on 9 September 2006;
- (3) Member E and Member F were properly deprived of their offshore powerboat racing licences for 2006;
- (4) Member E and Member F should each be disqualified from holding any offshore powerboat racing licence valid before 1 January 2012.



*Charles Flint.*

Blackstone Chambers  
12 July 2007

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